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NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Petitioner,

v.

MARRIOTT FAMILY RESTAURANTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

When four federal judges are equally divided as to whether or not a written agreement is susceptible to more than one reasonable interpretation, may the agreement properly be held unambiguous as a matter of law?

In matters of contract construction and interpretation, may the appellate court disregard or fail to consider in its review *de novo*, the uncontroverted expert testimony as to the meaning of a phrase particular to the industry involved that appears in a written agreement?

May a United States Circuit Court of Appeals panel majority reverse the jury verdict where that verdict gives effect to the same meaning of the written agreement found by two federal judges?

PARTIES

PETITIONER

(Plaintiff-Appellee in the United States Court of Appeals for the Sixth Circuit):

Construction Interior Systems, Inc.

RESPONDENT

(Defendant-Appellant in the United States Court of Appeals for the Sixth Circuit):

Marriott Family Restaurants, Inc.

Petitioner, Construction Interior Systems, Inc., has no parent company nor subsidiary company. The only parties to the proceeding for which Petitioner seeks review are those listed in the caption of the case.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices for the Supreme Court of the United States:

The Petitioner, Construction Interior Systems, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion for which Petitioner seeks review is reported at 984 F.2d 749 (6th Cir. 1993), and appears in the Appendix beginning at page 1a.[1] The United States Court of Appeals for the Sixth Circuit also entered two unreported dispositions. The first was filed February 7, 1991, dismissing without prejudice defendants-appellants' appeal *sua sponte* for lack of jurisdiction. This unreported opinion is reproduced in the Appendix beginning at page 25a. The second unreported decision was the Sixth Circuit's denial of plaintiff-appellee's Peti-

[1] For convenience, citation to the Opinion is made both to its reported F.2d page number and to its Appendix page number.

tion for Rehearing, filed on April 2, 1993. This unreported opinion is reproduced in the Appendix beginning on page 24a.

The jury verdict in the proceeding before the United States District Court for the Southern District of Ohio was entered on November 16, 1990 (Appendix at 38a). This Entry is reproduced in the Appendix on page 39a. In the course of these proceedings, the trial court filed two unreported decisions. The first granted partial summary judgment in favor of the respondent (defendant below), and is reproduced in the Appendix beginning on page 27a. The second denied respondent's motions for judgment notwithstanding the verdict and for a new trial. This opinion is reproduced in the appendix beginning on page 33a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its decision on this matter on January 29, 1993. (Appendix at 1a) On February 26, 1993, Construction Interior Systems, Inc. timely filed a petition for rehearing, which petition was denied in the Order filed on April 2, 1993. (Appendix at 24a) Construction Interior Systems, Inc. timely filed a motion for extension of time within which to file its Petition for a Writ of Certiorari on July 1, 1993. This motion was granted by The Honorable John Paul Stevens on July 6, 1993. This petition is filed on July 14, 1993, which is within the time granted by the extension.

The United States Supreme Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Jurisdiction before the United States District Court for the Southern District of Ohio was appropriate in this case pursuant to 28 U.S.C. § 1332 by reason of diversity of citizenship and the amount in controversy, which exceeded the sum of $50,000.

STATEMENT OF THE CASE

This case involves the breach of a Settlement Agreement entered into in early 1984 between petitioner (Plaintiff-Appellee, Cross-Appellant below) Construction Interior Systems, Inc. ("CIS") and respondent (Defendant-Appellant, Cross-Appellee below) Marriott Family Restaurants, Inc. (formerly Howard Johnson Company) ("respondent").[2]

CIS is a company engaged in the business of refurbishing motel rooms. The company was formed in 1979 by John Penker, its President, and his associate, Lowell Cady. *Construction Interior Systems, Inc.* v. *Marriott Family Restaurant, Inc.*, 984 F.2d 749, 750 (6th Cir. 1993); 2a. From 1980 until early 1983, when respondent removed CIS from its list of approved bidders, CIS performed approximately 90-95% of its work for respondent. *Id.* In 1983, three contracts previously awarded to CIS were canceled and CIS was removed from the list of approved bidders for future work. *Id.* at 750-51; 2a. At that time CIS was one of the four primary pre-approved bidders on respondent's list for motor lodge refurbishing work and received invitations to bid on *all* such work. *Id.* at 751; 3a. CIS was awarded approximately 55% of all the jobs it chose to bid. *Id.* The removal from the list of approved bidders meant that CIS would no longer receive bid invitations for respondent's motor lodge refurbishment work and, therefore, could not bid on such work.

After substantial discussions, the damage claims of CIS were resolved in a meeting on December 20, 1983. Thereafter most of the essential features of the settlement were set out in a Settlement Agreement, which is evidenced in two letters,

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[2] Marriott Corporation purchased the stock of Howard Johnson Company in 1985. Howard Johnson Company then began doing business under the name of Marriott Family Restaurants, Inc. A new entity, known as Howard Johnson Company, Inc., purchased the Howard Johnson motor lodges from Marriott Corporation in 1985. Howard Johnson Company, Inc. is a wholly-owned subsidiary of Prime Motor Inns, Inc. and is unrelated to Marriott Corporation and Marriott Family Restaurants, Inc.

dated January 24, 1984 and February 1, 1984. *Id.* at 751; 2a. Accurate copies of these Agreements appear in the Appendix beginning at pages 61a and 63a, respectively. Under the Settlement Agreement, CIS released the claims it had against respondent, in exchange for which the respondent agreed:

> We agree immediately to put you on the bidders' list for construction and rehab work. If after one year from this date you have not been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000.

984 F.2d at 751; 3a. The parties also agreed that, if CIS failed to perform properly any job it was awarded, respondent could terminate its relationship with CIS and take it off the bid list upon payment to CIS of the sum of $15,000.00. *Id.* On the basis of the industry-wide usage of the term "bidders list", as well as the past practice between the parties, CIS understood and intended the Settlement Agreement provision quoted above to provide that the respondent would invite CIS to bid on all refurbishing work just as it had previously. *Id.* John Stearns, a Vice President of respondent who negotiated and drafted the Settlement Agreement on respondent's behalf, fully agreed that under the Agreement CIS was to recieve an invitation to bid every refurbishing job. Testimony of John Stearns, 54a-55a; Tr. 564-65. (Pertinent excerpts from the trial record are attached hereto in the Appendix beginning at page 40a). Nevertheless, respondent contended at trial that this provision merely obligated respondent to put CIS's name on a list, but not to send invitations to CIS to bid for all future refurbishing projects as it had done in the past. 984 F.2d at 751; 3a.

After the Settlement Agreement was executed, CIS did not receive a single invitation to bid any refurbishment work in

the 1983-84 fiscal year. *Id.* Upon inquiry by CIS early in 1984, respondent falsely claimed that all the work for the current construction year had been previously awarded during the several weeks that CIS was reviewing the Settlement Agreement. At respondent's suggestion, the parties agreed to extend the terms of the Settlement Agreement to 1984-85 fiscal year in lieu of discussing the cash settlement necessary to terminate the agreement. 984 F.2d at 751; 4a.

In November 1985, Marriott Corporation purchased Howard Johnson; it began doing business as "Marriott Family Restaurants, Inc.", and assumed all of Howard Johnson's contractual obligations, including its obligations to CIS. *Id.* at 752; 5a. In all, respondent solicited bids from other contractors on 1500 rooms of refurbishment work in 1984, and over 12,000 rooms in 1985, yet respondent sent to CIS only two invitations to bid refurbishing work during this entire period. *Id.* In April, 1986, respondent informed CIS that there was nothing respondent could do about the Settlement Agreement; of course, CIS understood this as repudiation of the Settlement Agreement. *Id.*; 5a-6a. Consequently, CIS filed the present action.

The trial court found the relevant contractual provision, quoted above to be ambiguous as a matter of law; consequently, the meaning of the Settlement Agreement was submitted to the jury for determination. *Id.* at 754; 9a. The question was whether being restored to the bidders' list, as stated in the Settlement Agreement, meant that CIS was again to receive invitations to bid on all refurbishing jobs. In November 1990, the jury, in a general verdict, resolved the ambiguity in favor of CIS and awarded damages in the amount of $380,590. *Id.* (*See* Appendix at 38a). The District Court denied respondent's motions for judgment notwithstanding the verdict and for a new trial. *Id.* at 753; 7a. (*See* Appendix at 33a). Marriott Family Restaurants appealed to the United States Court of Appeals for the Sixth Circuit, which, on January 29, 1993, reversed the judgment.

The Court of Appeals made a *de novo* review of the District Court's legal conclusion that the above quoted contract provision was ambiguous. *Id.* at 754; 10a. Two of the three judges on the Court of Appeals panel concluded that the trial court erred as a matter of law in finding the phrase at issue to be ambiguous. *Id.* at 756-57; 14a-15a. The panel majority found that the ordinary meaning of CIS being "put on the bidder's list" was wholly independent of the respondent ever sending to CIS an invitation to submit a bid on any refurbishing work.

The dissenting opinion observed that the majority's construction of the phrase, "put you on the bidders' list," results from reading the first sentence in isolation from the rest of the paragraph:

> The language, "[i]f . . . you *have not been the successful bidder* on $300,000 worth of work," implies that CIS was to be given the opportunity to be a bidder on one or more projects worth $300,000. There was no way CIS could be an unsuccessful bidder without, in the first instance, being a bidder.
>
> Based on the foregoing, CIS and Howard Johnson must have intended the contract to mean that CIS would actually get invited to bid on at least one project. Unlike the majority, I find this interpretation to be the ordinary meaning of the contract terms. Because I have indicated what I deem to be a reasonable interpretation of the contract, and because the majority has indicated what it holds to be a reasonable interpretation of the contract, I would hold that the contract is ambiguous as a matter of law.
>
> There is a further ambiguity in the contract. What did the parties intend by the phrase, "put you on the bidders' list"? Two interpretations of "put you on the bidders' list" are suggested. First the phrase could mean that CIS gets put on a list and by virtue of getting on

> this list, it gets to bid on all construction or "rehab" projects for which Howard Johnson solicits bids. * * * Second, the phrase could mean that CIS gets put on a list and gets to bid on projects that Howard Johnson independently decides to allow CIS to bid on. . . .
>
> The contract fails to further define "put you on the bidders' list." As a result, either of these two interpretations is reasonable. Therefore, I find that this phrase is ambiguous as a matter of law.

Id. at 759; 19a-20a.

ARGUMENT

Supreme Court Rule 10.1(a) provides that the United States Supreme Court, in exercising its discretion to grant Petition for Writ of Certiorari, will consider the degree to which a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision." The present case presents a paradigm example of just how far an appellate court can depart from accepted judicial practice.

The Court of Appeals correctly pointed out and then ignored the controlling Ohio law:

> [C]ontract terms are to be given their plain, ordinary meaning unless: (1) expert testimony provides a different meaning, *particular to the industry involved;* (2) some other meaning is clearly evident from the face or overall content of the instrument; or (3) manifest absurdity would result.

Id. at 756; 13a (citing *Latina* v. *Woodpath Development Co.*, 57 Ohio St 3d 212, 567 N.E.2d 262 (1991); *Aultman Hospital Association* v. *Community Mutual Insurance Co.*, 46 Ohio St. 3d 51, 544 N.E.2d 920 (1989)). It turns out that, the Court of Appeals' opinion notwithstanding, all three of these exceptions to the general principle, "contract terms are to be given their plain, ordinary meaning," apply in the present case.

A. Expert Testimony Provided a Meaning, Particular to the Industry Involved, Different From The Panel Majority's "Plain, Ordinary Meaning."

The importance of expert testimony in determining the meaning of a phrase particular to an industry is well known to this Court. *See, e.g., Baker* v. *W.J. Kennedy Dairy Co.*, 77 F.2d 574, 576 (6th Cir. 1935), *cert. denied*, 296 U.S. 634 (1935).

In the present case, the limited meaning the respondent sought at trial to attach to the phrase, "put you on the bidders' list," is the opposite of its meaning particular to the industry and the opposite of the intention of the parties at the time the settlement agreement was created.

The panel majority concluded that the plain, ordinary meaning of "put you on the bidders' list" in the Settlement Agreement is only to reinstate CIS to the bidders' list without Howard Johnson ever having to give CIS the opportunity to bid on the available work:

> CIS was put on the bidders' list. While CIS disputes that it was given all the rights which it contends should have flowed from being on the list, these alleged rights are not spelled out on the agreement. Nor was there any expert testimony to the effect that the refurbishment construction industry has a particular meaning for the phrase "put on the bidders' list."

784 F.2d at 756; 13a.

It is unclear how the majority could have erroneously concluded there was no such testimony explaining the phrase, "put you on the bidders' list" in the context particular to the industry involved. John Penker, the president of CIS, testified on cross examination:

> Q. And, Mr. Penker, [in the letters of 1/24/84 and 2/1/84, Appendix at 61a, 63a], there is no explicit language that says that Construction Interior Systems is entitled to bid any particular number of jobs; is there sir?
>
> A. In terms of standard construction practice, when you are place on a bidders' list, you are issued invitations for all bids issued by that person who creates the list. That is the standard construction practice.
>
> Q. There is no such language in [the letters]; is there sir?

> A. Yes, there is, the first sentence: "We agree immediately to put you on the bidders' list for construction and rehab work." Under standard construction practice, that means you have the opportunity to bid the work that is available from that company. That is the purpose of the list.

49a-50a; Tr. at 274-275.[3]

The respondent, however, argued that in drafting the settlement agreement, it had intended "put you on the bidders' list" to have a meaning different than its meaning particular to the construction and rehab industry. There is no evidence in the record that such an intended different meaning was ever disclosed by respondent to CIS. Moreover, the respondent's witnesses were not consistent with the position of the respondent concerning its intended but undisclosed meaning of the phrase. The respondent's witnesses often confirmed that Howard Johnson intended the phrase, "put you on the bidders' list" to mean that Howard Johnson would invite CIS to bid on whatever work came along at least from February 1984 and thereafter. Mr. Stearns, the vice president of Howard Johnson and draftsman of the settlement agreement, testified on cross examination:

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[3] This evidence was received without objection or motion to strike by the defendant. Nor did the defendant challenge the expert qualifications of the witness to testify regarding the meaning of the phrase "put on the bidders' list" particular to the construction and rehab industry. It cannot reasonably be doubted that Mr. Penker is an expert in this particular industry. Mr. Penker's experience in the motor lodge renovation and refurbishing industry spans more than a decade; first, beginning early in the 1970's as vice-president of construction for Winegardner & Hammons (which has over 42 Holiday Inns acrosss the United States) and then, continuing in 1979 as predident of CIS which did renovation and refurbishing work for Ramada Inn, Holiday Inns, Best Western, Budgetel, Imperial 400, Marriott, as well as for Howard Johnson, all in the period immediately before the settlement agreement of January 24, 1984. 41a-45a; Tr. at 41-46.

> Q. This agreement, [the letters of 1/24/84 and 2/1/84, Appendix at 61a, 63a] contemplates, does it not, that there will be work in 1984 which CIS may bid upon?
>
> A. That would be the intention, sure, that they bid on work effective '84, *whatever work came along, they would be invited to bid* if they — they qualified for.
>
> Q. And thereafter?
>
> A. *And thereafter.*

54a-55a; Tr. at 565 (emphasis added)[4]

Thus, the settlement agreement intended (contrary to a later position of the defendant at trial) to reinvest in CIS the opportunity to bid on all the refurbishing. This intended meaning is further confirmed by Robert Wickham, group vice-president for Howard Johnson, in a May 14, 1984 letter to CIS: "Perhaps if you were to make us familiar with your availability for project assignments through the coming fiscal year, we can make suitable arrangements for you to place a bid *on that work which will be available.*" (An accurate copy of this letter is attached hereto in the Appendix at page 65a).

Quite clearly, the majority has in this respect misapprehended the record evidence. The undisputed expert

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[4] There was never an assertion made by the defendant at trial or a defense raised in its pleadings that CIS was not qualifed to perform the construction and rehab work contemplated by the settlement. To be put on the bidders' list was, in and of itself, an acknowledgement by Howard Johnson that CIS was qualifed to do the refurbishing work, just as it had been doing before the dispute developed between the parties.

In response to the trial court's inquiry, "What's the purpose of being put on the bidders' list? That must mean something?", counsel for the defendant responded, "They are a qualified bidder." 59a; Tr. at 619. *See also* Testimony of Mr. Penker, 46a-47a; Tr. at 76.

testimony concerning the Settlement Agreement is that, in the construction and refurbishing industry, "put you on the bidders' list" means that CIS will have the opportunity to bid *all* the work available. This meaning, both in the industry and as it applied to the previous practices between the parties, is in accord with the testimony of respondent's own witness, Mr. Stearns, and with the letter of respondent's vice-president Mr. Wickham. The evidence supports the reasonable meaning that the jury accorded to the meaning of "put you on the bidders' list," as used in the settlement agreement.

The meaning of the phrase "put you on the bidders' list" as found *de novo* by the panel majority, is in direct opposition to the wholly undisputed expert testimony as to the meaning of this phrase that is particular to the construction and refurbishing industry. Accordingly, the holding is in direct opposition to the well settled persuasive effect of expert testimony as to the meaning in a written agreement of a phrase otherwise undefined therein but which is particular to the industry involved.

B. A Meaning is Evident from the Face and the Overall Content of the Contract That Is Different From The Panel Majority's "Plain, Ordinary Meaning."

The Sixth Circuit recently stated in *Smith* v. *ABS Industries*:

> The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the purposes of the parties. . . . Where ambiguities exist, the court

> may look to other words and phrases in the [agreement] for guidance.[5]

The Sixth Circuit has also recently declared, "[a]mbiguity exists only where a term cannot be determined from the four corners of the agreement or where contract language is susceptible to two or more reasonable interpretations."[6] During the course of this case, four federal judges have considered the pertinent language of the settlement agreement. The judges are equally divided on whether or not the phrase "put you on the bidders' list" has a meaning that can be discerned from the four corners of the document or whether the phrase is susceptible to more than one reasonable interpretation. When four thoughtful, reasonable and experienced jurists are thus polarized, such disagreement itself manifest that the pertinent language is ambiguous. For the panel majority to hold otherwise constitutes a radical departure not only from accepted judicial procedure, but also from the fundamental meaning of the word "ambiguous".

No less importantly, as the dissent notes, even if one relies upon the ordinary, plain meaning of the settlement agreement without resort to extrinsic evidence:

> The language, "[i]f . . . you *have not been the successful bidder* on $300,000 worth of work," implies that CIS was to be given the opportunity to be a bid-

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[5] *Smith* v. *ABS Industries, Inc.*, 890 F.2d 841, 845-846 (6th Cir. 1989). *Accord, Hybud Equipment Corp.* v. *Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 666 (1992), 597 N.E.2d 1096, *reh'g denied*, 65 Ohio St. 3d 1445, 600 N.E.2d 686 (1992); *Cleveland Electric Illuminating Co.* v. *Cleveland Ins. Co.*, 37 Ohio St. 3d 50, 55 (1988), 524 N.E.2d 441, *reh'g denied*, 38 Ohio St. 3d 704, 532 N.E.2d 1321 (1988); *Alexander* v. *Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241 (1978), 374 N.E.2d 146.

[6] *Potti* v. *Duramed Pharmaceuticals, Inc.*, 938 F.2d 641, 647 (6th Cir. 1991) (citing *Wells* v. *American Electric Power Co.*, 48 Ohio App. 3d 95, 548 N.E.2d 995 (1988)).

> der on one or more projects worth $300,000. There was no way CIS could be an unsuccessful bidder, without in the first instance, being a bidder.

984 F.2d at 759; 19a (Jones, J., dissenting).

The panel majority found the passage at issue to be analogous to the unambiguous language at issue in *Latina* and *Aultman*, *supra*. We respectfully suggest that this reliance is misplaced for the following reasons.

The *Latina* court found that the phrase, "right to purchase," contained in a letter agreement between the parties could not be construed to be synonymous with the phrase, "right of first refusal." The court stressed that parol evidence by way of expert testimony would be proper to provide a "[s]pecial meaning given by the industry to the language employed in the contract." The court then noted:

> Latina's expert opined, however, that the words "right to purchase" has no meaning particular to the real estate development industry. Therefore, the words "first right to purchase" must be given their ordinary meaning as was done by the court of appeals.

Latina, 57 Ohio St. 3d at 214.[7]

The *Aultman* court was faced with a different consideration. The court first reiterated that in construing any written agreement under Ohio law, "[t]he primary and paramount objective is to ascertain the intent of the parties" so as to give effect to their intention. At issue was whether under the terms

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[7] Footnote 1, (in the quoted text) states: "In contrast, Latina's expert also opined that the words 'right of first refusal' have a special meaning in the real estate industry — the right to match a third-party offer. Therefore, had the October 1984 letter employed the phrase 'right of first refusal,' then parol evidence would have been admissible to provide the meaning of the phrase in the real estate industry." *See also Hosford* v. *Automatic Control Systems, Inc.*, 14 Ohio App. 3d 118, 470 N.E.2d 263 (1984).

of an integrated written agreement between the hospitals and Blue Cross, the latter was only permitted to issue traditional subscriber contracts. Of persuasive effect was that the contract defined the terms relevant to whether or not any such limitation was imposed upon Blue Cross. The court considered in the overall contents of the contract, the defined terms "subscriber," "service contract," and the express language that provided the one limitation to Blue Cross' ability to issue service contracts. The court concluded:

> Where the parties expressly provide the only limitation on the issuance of service contracts, it is error for the trial court to admit extrinsic evidence providing for additional limitations (citing authority), where the meaning is clearly evidenced from the overall contents of the instrument.

Aultman, 46 Ohio St. 3d at 54.[8] Therefore, *Latina* and *Aultman* are not dispositive of whether or not here are ambiguities in the present Settlement Agreement.

C. The Panel Majority's "Plain Ordinary Meaning" Results In Manifest Absurdity.

From the very beginning of the settlement negotiations, CIS contended that in late 1983 Howard Johnson wrongfully terminated three construction and refurbishing jobs it had previously awarded to CIS as the low bidder and upon which CIS had undertaken arrangements to begin preliminary work prior to actual construction and refurbishing. The three jobs totaled over $775,000 worth of business for CIS.

In the settlement discussion, Howard Johnson offered more work for CIS in 1984 and 1985 to make up for any damages

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[8] Ohio law holds that even in an integrated contract, the use of parol evidence is proper to resolve ambiguities. *Clark* v. *Hartley*, 7 Ohio App. 3d 147, 149 n.3, 454 N.E.2d 1322 (Cuyahoga Cty. 1982).

claimed by CIS for the wrongful termination of its three contracts. Mr. Stearns testified that during the settlement discussion respondent disclosed to CIS that there were 2,500 rooms to be refurbished in 1984, and that CIS would be invited to bid on all of them under the terms of the Settlement Agreement. 55a-56a, 57a; Tr. 585, 590-591. Mr. Penker relied on Mr. Stearns' information concerning the substantial opportunity for CIS to more than make up for damages caused by the contract terminations, (45a-46a; Tr. 69-70), and responded on cross examination:

> So they were making an offer to us to offset the damages we had suffered in '83 and, therefore, the offer had to be substantial, and that's when he said, "We have a planned program for 1984 and a similar amount of work in 1985 amounting to 2500 rooms."

50a-51a; Tr. at 276-277.

If CIS had not been restored to its previous ability to bid on all of these jobs as a result of Howard Johnson agreeing "to put you on the bidders' list" as Mr. Penker testified (Tr. 76) without contradiction, then, as he further testified on cross examination, the Settlement Agreement "[m]eans nothing in terms of an incentive to do anything because . . . certainly that is not an offer in comparison with the losses that we had claimed in '83." 50a; Tr. at 276. Under the panel majority's interpretation of the contract language at issue CIS gave up claims worth more than $775,000 of business in exchange for: (1) $300,000 worth of business, and (2) being placed on a list that has nothing whatever to do with solicitation of bids and generation of new business. Such an exchange constitutes a manifest absurdity. The truth is, CIS gave up its claims in order to have a fair opportunity to bid on 2,500 rooms, an opportunity that respondent was obligated to provide, but did not.

CONCLUSION

The panel majority's interpretation of the phrase "put you on the bidders' list": (1) is at odds with uncontroverted expert testimony; (2) is at odds with another meaning that is clearly evident from the face and from the overall content of the instrument; and (3) results in manifest absurdity. Any one of these three conditions constitutes a sufficient basis on which to conclude that the panel majority's *de novo* finding the language at issue to be unambiguous as a matter of law is a departure from the accepted and usual course of judicial proceeding. This petitioner suggests that Supreme Court Rule 10.1(a) reasonably contemplates review of the panel majority's opinion by an exercise of the Supreme Court's power of supervision. The petitioner respectfully prays that this Court exercise its discretion to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3330/3373

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff-Appellee,

v.

MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 29, 1993

Before: JONES and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

JOINER, Senior District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. JONES, Circuit Judge (pp. 18-22), delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. The defendant, Marriott Family Restaurants, Inc., appeals,

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*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

and the plaintiff, Construction Interior Systems, Inc., cross-appeals the district court's judgment for Construction Interior Systems, Inc., in this diversity contract action based upon an alleged breach of a settlement agreement. For the reasons that follow, we reverse the judgment of the district court.

I.

The plaintiff in this action is Construction Interior Systems, Inc. (CIS), a company engaged in refurbishing motel rooms. The defendant is Marriott Family Restaurants, Inc. (Marriott), a corporation which previously conducted business as the Howard Johnson Company (Howard Johnson). John Penker, CIS's president, and his associate, Lowell Cady formed CIS in 1979. From 1980-83, CIS performed 90 to 95 percent of its work for Howard Johnson. In 1983, a dispute, over an issue that remains unidentified in the record, arose between CIS and Howard Johnson. As a result, Howard Johnson removed CIS from its list of approved bidders for future work and cancelled all then-current contracts with CIS.

CIS protested Howard Johnson's actions. The parties negotiated the dispute extensively and resolved their differences in a meeting. The terms of their settlement were set out in two letters: one dated January 24, 1984, sent by John Sterns, a vice president at Howard Johnson, to Penker, and one dated February 1, 1984, sent by Penker to Stearns. The parties agreed that CIS would release all claims that it had against Howard Johnson arising out of the cancelled contracts in exchange for Howard Johnson's promise of the following:

> We agree immediately to put you on the bidders' list for construction and rehab work. If after one year from this date you have not been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance

> by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000.

The parties further agreed that Howard Johnson could cancel any contract with CIS and again remove the company from the bidders' list if the work was not properly performed but that Howard Johnson would, in that event, pay CIS the sum of $15,000.

Marriott contends that Howard Johnson restored CIS to the bidders' list by early February 1984 just as it had agreed to do. Marriott insists, however, that every contractor on the bidders' list was not solicited for bids on every project; moreover, Marriott claims that solicited bids were evaluated based upon a number of factors, and projects were usually, but not necessarily, awarded to the lowest bidder.

On the other hand, CIS contends that it was one of the four primary bidders on Howard Johnson's list for motor lodge refurbishing work, that it had received invitations to bid on *all* such work for Howard Johnson in the past, and that it had been successful approximately 55 percent of the time. CIS alleges that because the bidders were pre-approved, Howard Johnson awarded contracts for the refurbishing work to the lowest bidder. Thus, in CIS's view, the settlement agreement provision requiring Howard Johnson to restore CIS to the bidders' list meant that CIS would have the opportunity to bid on all refurbishing work as it had before the dispute.

CIS did not receive an invitation to bid for motor lodge room refurbishment work in January or February of 1984. Defendant does not dispute this. In early March 1984, CIS attempted to reach Howard Johnson to find out what bids were upcoming. In late April 1984, Howard Johnson responded, apprising CIS of the fact that all 1984 refurbishment work already had been contracted. Penker then wrote to Robert Wickham, another vice president of Howard Johnson who had been involved in negotiating the

settlement agreement, stating his regrets that all 1984 work had been awarded to other contractors. He further stated:

> Unfortunately, these circumstances suggest that we will not have an opportunity to re-establish a working relationship with your company for the major portion of this year as hoped and anticipated by our recent agreement. We wish to recommend therefore that our agreement be extended to cover the 1984-85 fiscal year in lie[u] of discussing any cash settlement necessary to terminate our agreement.

Wickham responded in May 1984, confirming that all 1984 work had been awarded and consenting to extend the agreement as Penker requested to cover the 1984-85 fiscal year.

By the spring of 1985, it became clear that the potential for Marriott Corporation to buy out Howard Johnson was great, and, as a result, all refurbishing work was put on hold until the new management came in to make decisions. By June of 1985, CIS apparently was aware of this situation -- albeit from outside sources -- as evidenced by a June 11 letter Penker sent to Stearns asking what impact all of these events would have on the settlement agreement.

> Assuming that our knowledge is reasonabl[y] accurate and a sale could occur in 1985 we are concerned first that our settlement agreement will transfer and be recognized by any new ownership and secondly, that the agreement terms can be fulfilled in 1985 since a change in ownership could result in delays of renovation programs while a reassessment or restructuring period occurs within the Company.

Stearns responded that Howard Johnson intended for CIS to continue to receive bid invitations, with the hope that their former business relationship would resume.

In November 1985, Marriott Corporation purchased the stock of Howard Johnson, and Howard Johnson began doing business under the name Marriott Family Restaurants, Inc. Contemporaneously, the motor lodges were sold separately to a new and unrelated entity, Howard Johnson Corporation, Inc. (HJC), a wholly-owned subsidiary of Prime Motor Inns, Inc. All contracts specifically relating to the motor lodges were transferred, along with the lodges themselves, under an indenture of transfer. Additionally, HJC entered into an assumption and indemnity agreement pursuant to which it assumed all obligations and liabilities relating to the assets, including claims arising from contractual obligations undertaken or assumed by Howard Johnson during the time when it was the owner of the assets. In 1986, HJC accepted and awarded bids for the 1985 motor lodge refurbishment program, which had been held in abeyance by Howard Johnson pending the purchase of the company. CIS was on the bidders' list HJC obtained from Howard Johnson. CIS was the successful bidder on four of these 1985 projects, giving the contractor in excess of $495,000 worth of refurbishment work.

Defendant asserts that the $495,000 worth of work given to CIS by HJC was in satisfaction of the settlement agreement. CIS complains to the contrary that from 1984 to 1985, *Howard Johnson* -- as opposed to HJC -- gave CIS only four invitations to bid on projects, two of which were not the type of work CIS was qualified to do. CIS was not the low bidder on the remaining two and was not awarded the project. CIS alleges that it was never reinstated on Howard Johnson's bidders' list, as CIS understood that term to mean, and that it never had the opportunity to bid on the 1500 rooms that constituted the 1984 refurbishment work or on the over 12,000 rooms that were in the 1985 and subsequent refurbishing programs. Cady, of CIS, alleges that on March 5, 1986,

after Marriott had become the owner of the company, he spoke with David Vancura, the head of Marriott's architectural, design, and construction department, who told him that Marriott intended to work with only local, as opposed to national, contractors on refurbishment jobs in the future. During negotiations in an April 1986 meeting, a Marriott attorney, Mr. Peltz, said that he could not give Cady an answer about the settlement agreement at that time. Peltz later stated to Cady that "he could not do anything for [CIS]." CIS insists that this statement constituted a repudiation of the settlement agreement and that Marriott never offered to cure the repudiation.[1]

CIS filed suit in federal court, asserting that the settlement agreement was void and alleging claims relating to the originally disputed projects. The district court granted Marriott's motion for partial summary judgment on the ground that the settlement agreement between CIS and Howard Johnson was valid and constituted a full and complete settlement of all CIS's original claims. The district court held that any claims of CIS were limited solely to those based on the terms of the settlement agreement.

CIS amended its complaint, seeking damages for the alleged breach of the settlement contract. The named defendants were Marriott Corporation (parent corporation that purchased the stock of Howard Johnson in 1985); Marriott Family Restaurants, Inc. (Howard Johnson doing business under a new name); and the new entity known as HJC (which purchased the motor lodges from the old Howard Johnson).

The defendants filed a motion for summary judgment on the grounds that (1) their obligations under the settlement agreement were satisfied because CIS received

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[1]The precise title and scope of authority David Vancura had to speak for defendant in March 1986 is not clear from the record. Nor is it clear whether Cady and CIS understood at this time that HJC, not defendant, would be awarding motor lodge refurbishment contracts.

in excess of $300,000 worth of motor lodge refurbishment work; (2) if not, any potential damages recoverable by CIS must be limited to CIS's net profit on $300,000 worth of refurbishment work; and (3) the damages claimed by CIS were speculative. The district court denied this motion. The case was stayed as to HJC because it filed for bankruptcy; Marriott Corporation was dismissed. The case against Marriott (Marriott Family Restaurants, Inc.) was tried to a jury in November 1990.

The jury returned a general verdict in favor of CIS and awarded damages in the amount of $380,590. Marriott timely filed proposed findings of fact and law on its declaratory judgment counterclaim, along with a motion for judgment notwithstanding the verdict (j.n.o.v.) or, alternatively, a motion for new trial. The district court denied these motions.

Marriott raises a number of issues on appeal, contending that the district court erred: first, in denying its motion for a directed verdict or j.n.o.v. on the ground that its obligations under the settlement agreement were satisfied as a matter of law; second, in admitting parol evidence relating to the meaning CIS attached to various contract provisions because that evidence added to and contradicted the terms of the fully integrated, unambiguous settlement agreement; third, in leaving the application of the parol evidence rule to the jury; and, finally, in allowing the jury to calculate damages based in part on the number of motel rooms refurbished in 1984. CIS cross-appeals, contending that the district court erred in preventing it from presenting evidence concerning damages beyond the years 1984 through 1986.

For the reasons stated below, we conclude that defendant's obligations under the settlement agreement were satisfied as a matter of law in 1986 by CIS's receipt of over $485,000 worth of refurbishment work from HJC, and that defendant's motion for j.n.o.v. should have been granted.

II.

The standard for granting a j.n.o.v. is the same as the standard governing a directed verdict. *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991); *Minton v. Southern Ry.*, 368 F.2d 719, 720 (6th Cir. 1966). Federal courts are required to apply the Ohio courts' standard for a directed verdict because Ohio's substantive law governs this action. *Potti v. Duramed Pharmaceuticals*, 938 F.2d 641, 645 (6th Cir. 1991). We have stated Ohio's standard as follows:

> Ohio courts require that a court presented with a motion for a directed verdict construe the evidence and all permissible inferences therefrom most strongly in favor of the party against whom the motion is made and consider neither the weight of the evidence nor the credibility of the witnesses in disposing of the motion. Such a motion will be granted only if, after considering the evidence in this light, there can be but one reasonable conclusion as to the proper verdict.

Id. (citations omitted). If reasonable minds could disagree as to whether Marriott had satisfied its obligations under the settlement agreement, then the district court was correct to deny Marriott's motion for j.n.o.v.

To make this determination, we start with an analysis of CIS's claims. The express language of the settlement agreement gave CIS two rights: first, to be put on the bidders' list, and second, to be awarded a total of $300,000 worth of work. According to CIS, being "put on the bidders' list" meant that it had the right to receive bid invitations on *all* of defendant's motel lodge refurbishment work, along with a legitimate expectation of being awarded a certain percentage of the work on which it bid. Further, according to CIS, the $300,000 figure mentioned in the settlement agreement was not the total amount of work it was entitled to be awarded, but simply a guarantee of the minimum of work it was

supposed to be awarded. To prove that the settlement agreement had this meaning (for even CIS does not contend that the agreement expressly states this), CIS sought to present evidence of its understanding of the phrase "put you on the bidders' list," and of its understanding of the intended obligations of the parties. The court allowed the admission of this parol evidence and, consistently with that ruling, charged the jury as follows:

> The parties have different views of what they were obligated to do under the Settlement Agreement. The plaintiff contends that Howard Johnson had two obligations under the Settlement Agreement. First, the plaintiff contends that Howard Johnson agreed to send the plaintiff invitations to bid for all motor lodge refurbishment work that Howard Johnson would undertake from that date forward as long as the plaintiff continued to perform the bid work according to bid plans and specifications. Second, if the plaintiff was not the successful low bidder on $300,000 worth of work during the first year, Howard Johnson had an additional obligation to negotiate with the plaintiff for the future performance of work that would equal a minimum of $300,000 worth of work.

In closing argument, CIS's counsel presented a calculation of damages based on the 1566 motel rooms requiring refurbishment work in 1984 on which CIS was not invited to bid. Counsel argued that CIS averaged an award of 44 percent of the contracts on which they had submitted bids in the past, which, at a total of $2006.58 per room, would have resulted in income of $1,382,614, and a gross profit of $411,708. A similar exercise calculated a lost gross profit of $541,801 for 1986. As noted above, the jury returned a general verdict in CIS's favor and awarded damages of $380,590.

CIS concedes that the district court found that the settlement agreement was fully integrated, and even now

does not dispute this finding. The law in Ohio concerning the effect to be given to a fully integrated agreement is clear:

> Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions. . . . *Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence.*

Aultman Hosp. Ass'n v. Community Mut. Ins. Co., 46 Ohio St. 3d 51, 544 N.E.2d 920, 923 (1989) (citations omitted; emphasis added). Even where a contract is not fully integrated, parol evidence cannot be admitted if its effect will be to vary or contradict any matter that is specifically covered by the written terms of the contract. *Id.* There can be no implied promises in a contract in relation to any matter that is specifically covered by the written terms of the contract. *Jost v. Burr*, 69 Ohio App. 3d 354, 590 N.E.2d 828, 831 (1990) (citing *Kachelmacher v. Laird*, 92 Ohio St. 324, 110 N.E. 933 (1915) (syllabus ¶1), and *Aultman* at 923).

Ohio law further provides that

> interpretation of written contract terms is a matter of law for initial determination by the court. . . . It is only when the relevant contract language is ambiguous that the job of interpretation is turned over to the fact finder . . . and the determination whether a contract is ambiguous is made as a matter of law by the court.

Potti, 938 F.2d at 647 (citations omitted). Here, the district court decided that the written settlement agreement was ambiguous.[2] We review de novo a district court's

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[2]Although the court stated in its order denying defendant's motion for j.n.o.v. that it found the agreement to be ambiguous, this finding is contradicted by the jury charge which allowed the jury to

legal conclusion regarding ambiguity. *Id.* Ohio law governs our determination regarding the claimed ambiguity in the settlement agreement. Two recent cases from the Ohio Supreme Court are instructive.

In *Latina v. Woodpath Development Co.*, 57 Ohio St. 3d 212, 567 N.E.2d 262 (1991), the court was required to decide whether a contract between a real estate developer and a home builder was ambiguous in its reference to the home builder having "the first right to purchase (or refuse to purchase) lots" in the project. The plaintiff home builder contended that the "first right to purchase" was the legal equivalent of a right of first refusal, which would have required that the developer present all other offers to buy the property to the builder, so the builder would have an opportunity to match the offers. The trial court allowed plaintiff to present expert testimony on the meaning which the plaintiff contended the contract language should have been given. The jury found that the contract language gave the plaintiff a right of first refusal, that defendant breached its obligations in this regard, and awarded plaintiff damages. *Latina*, 567 N.E.2d at 263-64.

The court of appeals reversed, and the supreme court affirmed the reversal, holding that the language "first right to purchase" meant precisely that -- the first right to purchase, and did not mean a right of first refusal. The court stated that while expert testimony is admissible to show a special meaning given by the industry to language employed in a contract, the plaintiff's expert testified that "first right to purchase" had no meaning particular to the real estate development industry. Consequently, the words "first right to purchase" had to be given their ordinary meaning, which required a finding that the defendant had fully performed its obligations by granting

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determine whether the agreement was ambiguous, and then how any ambiguity should be resolved. As noted above, it is the function of the court, not the jury, to determine whether a contract is ambiguous.

the plaintiff the first right to purchase the property in question. *Id.* at 264-65.

In *Aultman*, the supreme court addressed a similar claim. The plaintiff in *Aultman* was a hospital association which had had a contractual relationship with the defendant and its predecessor, Blue Cross, for many years. Pursuant to the contract, the plaintiff provided medical services to subscribers who were issued service contracts by Blue Cross. The term "service contract" was defined in the contract to mean any contract Blue Cross was authorized to issue. The plaintiff contended that the language "service contract" allowed Blue Cross to issue only "traditional" service contracts, pursuant to which Blue Cross charged subscribers a set premium and made payments to the hospitals on a discounted basis for services rendered. Defendant contended that it was free to issue "nontraditional" service contracts, pursuant to which subscribers were issued group contracts, paid no premiums, but were charged by Blue Cross on a cost-plus basis for services rendered by the hospitals. Blue Cross paid the hospitals on the same discounted basis used in the traditional plan.

The Ohio Court of Appeals concluded that the contract definition of "service contract" was circular and ambiguous, and that the trial court properly allowed extrinsic evidence to explain the meaning of the term. "The court [of appeals] also essentially held that the nontraditional subscriber agreements were beyond the reach of the discount agreement between the parties and that the parties' written contract did not contemplate nontraditional service agreements." 544 N.E.2d at 922. The supreme court reversed, relying on the test it had previously announced for determining whether contract language is ambiguous. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Id.* at 923 (quoting

Alexander v. Buckeye Pipe Line Co., 53 Ohio St. 2d 241 (syllabus ¶2), 374 N.E.2d 146 (1978)).

Applying this test, the court held that the term "service contracts" was unambiguous, and that the admission of extrinsic evidence was improper. According to the court, the construction of contract language urged by the plaintiff "would not be a construction at all but would amount to the making of a new contract for the parties which is not the function of the court." *Id.* at 923-24.

> In the absence of fraud or mistake, the hospitals' unexpressed intention cannot be implied in the contract. The language of the written contract which was signed by the parties is clear and does not forbid Blue Cross from issuing service contracts to groups of subscribers who compensate Blue Cross in a different manner than by payment of premiums. Blue Cross' issuance of nontraditional service contracts is therefore not a breach of the agreement with the hospitals.

Id. at 924.

Thus, according to *Latina* and *Aultman*, contract terms are to be given their plain, ordinary meaning unless: (1) expert testimony provides a different meaning, *particular to the industry involved*; (2) some other meaning is clearly evident from the face or overall content of the instrument; or (3) manifest absurdity would result.

The plain, ordinary meaning of the express language of the January 24, 1984, letter imposed two obligations on Howard Johnson. First, Howard Johnson was to put CIS on its bidders' list. CIS was put on the bidders' list. While CIS disputes that it was given all the rights which it contends should have flowed from being put on the list, these alleged rights are not spelled out in the agreement. Nor was there any expert testimony to the effect that the refurbishment construction industry has a particular meaning for the phrase "put on the bidders' list." On the

contrary, the testimony offered and admitted on this point concerned CIS's expectations and intentions. Under Ohio law, however, intentions not expressed in an unambiguous agreement are presumed to have no existence, and may not be shown by parol evidence. *Aultman*, 544 N.E.2d at 923.

The second obligation imposed on Howard Johnson by the express language of the January 24, 1984, letter was to either award $300,000 worth of work to CIS in the first year of the agreement or to negotiate with it in good faith so that it would thereafter receive, together with any work performed in the first year, a total of $300,000 worth of work. CIS contends that the $300,000 figure constitutes a guaranteed minimum only. The agreement does not say this, however. The agreement's plain, ordinary language simply gives CIS the right to a total of $300,000 worth of work. No other meaning is clearly evident from the face or overall content of the agreement. No expert testimony was proffered to show that a specific sum recited in an agreement such as this should not be construed to mean the total sum agreed on by the parties, but merely a minimum from which further obligations would flow. While CIS might have had a subjective expectation that $300,000 was the minimum of work that it would receive, its expectation does not define the obligation of Howard Johnson.

The right to be put on the bidders' list and to receive a total of $300,000 worth of work is all to which CIS was and is entitled unless it is clear that manifest absurdity would result from giving the contract language its plain, ordinary meaning. This is not the case, however. The record here demonstrates that the parties wished to resolve a prior dispute, during the course of which CIS was removed from the bidders' list and lost all opportunity to work with Howard Johnson. In exchange for giving up whatever claims they had against each other, the parties agreed to work together to allow CIS to receive $300,000 worth of work from Howard Johnson, and to be put on the bidders' list. The question whether this consideration

is adequate to compensate CIS for whatever it gave up by entering into the settlement agreement is not before us. It cannot be disputed that CIS received consideration of value in the form of being put on the bidders' list and being guaranteed $300,000 worth of work.[3]

In sum, the phrase "put on the bidders' list" and the agreement's reference to $300,000 worth of work are not qualitatively different than the language at issue in *Latina* ("first right to purchase or refuse to purchase"), or *Aultman* ("service contract"). Such terminology must be given its plain, ordinary meaning, and no other meaning is evident from the agreement itself or from usage particular to the construction industry. Enforcing the agreement according to the plain, ordinary meaning of its terms does not result in manifest absurdity. The agreement is not ambiguous as a matter of law.[4]

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[3]Under Ohio law, courts will not inquire into the adequacy of consideration once consideration is shown to exist. *Rogers v. Runfola & Assoc.*, 57 Ohio St. 3d 5, 565 N.E.2d 540, 542 (1991); *Irving Leasing Corp. v. M & H Tire Co.*, 16 Ohio App. 3d 191, 475 N.E.2d 127, 129-30 (1984).

> While it is necessary that the consideration of a promise should be of some value, it is sufficient if it be such as *could* be valuable to the party promising; and the law will not enter into an inquiry as to the adequacy of the consideration, but will leave parties to be the sole judges of the benefits to be derived from their contracts, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition.

Columbus Medical Equip. Co. v. Watters, 13 Ohio App. 3d 149, 468 N.E.2d 343, 346 (1983) (quoting *Judy v. Louderman*, 48 Ohio St. 562, 29 N.E. 181 (1891) (syllabus ¶2) (emphasis in original)).

[4]Since we find that the settlement agreement was not ambiguous, it follows that evidence relating to CIS's understandings and intentions, not expressed in the agreement, should not have been admitted. Parol evidence cannot add terms to a fully integrated, unambiguous agreement; nor can it contradict an agreement's existing, unambiguous terms. *Latina*, 567 N.E.2d at 264; *Aultman*, 544 N.E.2d at 923. Evidence adduced by CIS to the effect that it had the right to bid on all of Howard Johnson's refurbishment projects indisputably added an obligation to those expressly assumed by Howard Johnson. Evidence adduced by CIS to the effect that $300,000 was not the sum agreed to by the parties, but merely a

We must determine, however, whether defendant fully performed its obligations under the agreement, or, conversely, whether CIS has a claim for damages for some legitimate contractual obligation which was not met.

The settlement agreement provided that if CIS did not receive $300,000 worth of work in the first year of the agreement, Howard Johnson would negotiate with it in good faith for the performance of work by CIS which, together with any work performed by it in the first year, would total $300,000. CIS was not given an opportunity to bid on Howard Johnson's 1984 refurbishment projects. Howard Johnson still had the opportunity, within the letter and spirit of the settlement agreement, to negotiate with CIS for the total $300,000 worth of work it had promised. Moreover, at this point, CIS suggested that the agreement be extended into the next year and Howard Johnson agreed.

In 1985, the extended year of the agreement, CIS was again not invited to bid. However, this fact does not establish a breach of the agreement. Rather, consistent with the agreement's terms, Howard Johnson was contractually obligated to negotiate with CIS in good faith for the performance by CIS of $300,000 worth of work. By the time this obligation came into effect, Howard Johnson's stock had been acquired by Marriott Corporation, and its motor lodges acquired by HJC. CIS had previously stated its concern that the settlement agreement transfer "and be recognized by any new ownership . . . ." (Penker's letter of June 11, 1985.) HJC assumed Howard Johnson's contractual obligations to CIS, and, in its first year of operation, awarded $485,000 worth of work to CIS.

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minimum figure from which further obligations would flow indisputably contradicts the plain language of the agreement. In sum, the construction of the agreement which CIS urges this court to adopt is not a construction at all, but a request that the court remake the agreement. It is clearly not the function of the court to do so. *Id.* at 923-24.

The settlement agreement, as extended by the parties, gave CIS the right to be put on the bidders' list and the right to receive a total of $300,000 worth of work between 1985 and some unspecified amount of time thereafter. CIS was put on the bidders' list, and this list was given by Howard Johnson to HJC. In its first year, HJC awarded over $495,000 worth of work to CIS. The settlement agreement was fully performed as a matter of law, and CIS received everything to which it was entitled.

This conclusion makes it unnecessary to address the remaining issues raised by Marriott and CIS's cross-appeal. For the reasons stated, the judgment of the district court is **REVERSED**, and judgment is hereby ordered to be entered in favor of defendant Marriott Family Restaurants, Inc.[5]

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[5]Our conclusion that judgment must be entered in defendant's favor is based upon our holdings that the settlement agreement is not ambiguous as a matter of law, and was fully satisfied as a matter of law. Our conclusion does not require analysis of whether the evidence adduced by CIS was sufficient to support its theory of liability because we find that the theory of liability is without legal merit. Consequently, there are no fact issues to remand for a new trial. This court's recent decision in *Douglass v. Eaton Corp.*, 956 F.2d 1339 (6th Cir. 1992), does not require a different result. *Douglass* held that a court may not ignore improperly admitted evidence in ruling on a motion for j.n.o.v. based upon insufficiency of the evidence. *Id.* at 1343-44. "If plaintiff had been forewarned during the trial that such [evidence] was not admissible it conceivably could have supplied further foundation or even totally diferent evidence." *Id.* at 1344 (quoting *Midcontinent Broadcasting Co. v. North Central Airlines*, 471 F.2d 357, 359 (8th Cir. 1973)). The question here is not the sufficiency of the evidence in support of an otherwise valid legal theory, but the viability of the legal theory itself. Where the theory of liability lacks legal merit, it is proper to enter judgment notwithstanding the verdict. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-90 (1977).

NATHANIEL R. JONES, Circuit Judge, dissenting. Contrary to the majority opinion, I find the disputed language in the contract ambiguous. Furthermore, I find that CIS was entitled to damages in addition to any work awarded to it by HJC. Therefore, I respectfully dissent.

Under Ohio law, an "[a]mbiguity exists only where a term cannot be determined from the four corners of the agreement or where contract language is susceptible to two or more reasonable interpretations." *Potti v. Duramed Pharmaceuticals, Inc.*, 938 F.2d 641, 647 (6th Cir. 1991). Furthermore, as the majority indicates by citing *Latina v. Woodpath Dev. Co.*, 567 N.E.2d 262, 263-65 (Ohio 1991) and *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 544 N.E.2d 920, 922-24 (Ohio 1989), contract terms are to be given their ordinary meaning unless some other meaning is clearly evident from the face or overall content of the instrument or manifest absurdity would result.

Turning to this case, the pertinent contract language reads as follows:

> We [i.e., Howard Johnson] agree immediately to put you [i.e., CIS] on the bidders' list for construction and rehab work. If after one year from this date you have not been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000.

J.A. at 417. The majority holds that this language entitled CIS to be placed on a list with no guarantee that it would ever get invited to bid on a project. As Marriott--the successor to Howard Johnson and Defendant in this case--notes, Howard Johnson's policy was that not every

contractor on the bidders' list was solicited for bids on every project. Therefore, there were, at least conceptually speaking, two lists--we may call them the "master" and "subset" bidders' lists. The master bidders' list was essentially a list of *all* the companies that Howard Johnson would possibly deal with on construction and "rehab" work. The subset bidders' list was a list of the contractors who *actually* get solicited to bid on a particular project. With Howard Johnson's policy in mind, the contract could mean that CIS gets put on the master bidders' list with no guarantee that it would ever get solicited to actually bid on a project. If the first sentence of the paragraph is read in isolation, this seems to be a plausible interpretation. Presumably, a party could give valuable consideration for the right to be on the master list. The majority seems to reach this conclusion by reading this first sentence as though it is unconnected from the rest of the paragraph.

The first sentence cannot be read in isolation, however. Reading the first sentence in conjunction with the rest of the paragraph leaves the indelible impression that CIS did not give valuable consideration just to be put on the master list. The language, "[i]f . . . you *have not been the successful bidder* on $300,000 worth of work," implies that CIS was to be given the opportunity to be a bidder on one or more projects worth $300,000. There was no way CIS could be an unsuccessful bidder without, in the first instance, being a bidder.

Based on the foregoing, CIS and Howard Johnson must have intended the contract to mean that CIS would actually get invited to bid on at least one project. Unlike the majority, I find this interpretation to be the ordinary meaning of the contract terms. Because I have indicated what I deem to be a reasonable interpretation of the contract, and because the majority has indicated what it holds to be a reasonable interpretation of the contract, I

would hold that the contract is ambiguous as a matter of law.

There is a further ambiguity in the contract. What did the parties intend by the phrase, "put you on the bidders' list"? Two interpretations of "put you on the bidders' list" are suggested. First, the phrase could mean that CIS gets put on a list and by virtue of getting on this list, it gets to bid on all construction or "rehab" projects for which Howard Johnson solicits bids. This interpretation assumes that there is, at least conceptually, only one list that combines both the master and subset bidders' lists. Second, the phrase could mean that CIS gets put on a list and gets to bid on projects that Howard Johnson independently decides to allow CIS to bid on. This interpretation assumes that there are really two separate lists, namely a master bidders' and a subset bidder's list.

The contract fails to further define "put you on the bidders' list." As a result, either of these two interpretations is reasonable. Therefore, I find that this phrase is ambiguous as a matter of law.[1,2]

Because the jury found that "bidders' list" meant that CIS was supposed to be allowed to bid on every construction and "rehab" project for which Marriott solicited bids, and because CIS was not allowed to bid on every project, the question then becomes, what are the appropriate damages?

The majority argues that the fact that CIS was not invited to bid in 1984 and 1985 (pursuant to a contract

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[1]Because I think the paragraph is ambiguous, I would hold that the district court correctly admitted parol evidence. Rather than remaking the agreement (as the majority contends CIS is requesting), allowing parol evidence in this case helped define an otherwise undefined phrase, "bidders' list."

[2]I would also find that the jury instructions on ambiguity and parol evidence were proper.

extension) does not establish a breach of the agreement. The majority contends that consistent with the agreement's terms, Howard Johnson was contractually obligated to negotiate with CIS in good faith for the performance by CIS of $300,000 worth of work when CIS did not get at least $300,000 worth of work. The majority further contends that HJC, as the successor to Howard Johnson's contractual obligations to CIS, could satisfy the $300,000 minimum amount of work as was required under the contract. It is also asserted by the majority that any damages CIS could have received were satisfied by HJC's award of over $400,000 worth of work to CIS in 1986.

This reasoning directly follows the majority's conclusion that the language of the contract is unambiguous. Because I find that language ambiguous, I fundamentally differ on the analytical approach taken on the relationship between Howard Johnson and CIS and how to interpret HJC's awarding of over $400,000 worth of work to CIS in 1986.

Because the jury found the ambiguous language to mean that CIS was to have the opportunity to bid on each project, it is my view that the contract must be analyzed with that understanding. With the jury's verdict in mind, I read Howard Johnson's obligation to negotiate with CIS in good faith for the performance by CIS of $300,000 worth of work to mean that Howard Johnson was to negotiate with CIS if: 1) CIS was invited to bid on each project; and 2) after bidding on each project, CIS did not receive $300,000 worth of work. It seems to me that if Howard Johnson breaches one of the fundamental conditions of the contract, it does not matter whether Howard Johnson negotiates further with CIS. Because Howard Johnson did not allow CIS to bid on each project in 1984 and 1985, I would hold that Howard Johnson breached a fundamental condition of the contract.

By virtue of the breach, CIS is therefore entitled to damages from Howard Johnson for the years 1984 and

1985. I would find that the jury damage award given for the years 1984 and 1985 to be appropriate.[3,4]

For the reasons stated herein, I would affirm.

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[3]CIS's theory of damages was based on the following formula: 1) the number of rooms refurbished from 1984 and 1985 was multiplied by the average contract price; 2) the resulting dollar figure was multiplied by the percentage of rooms on which CIS expected to be the successful bidder; and 3) the resulting dollar amount was multiplied by CIS's percentage of profit to arrive at a final damage figure. I find CIS's theory of damages appropriate.

[4]HJC's award of over $400,000 worth of work to CIS in 1986 is separate from the damages CIS incurred because it was not invited to bid on every project in 1984 and 1985.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

Nos: 91-3330: 91-3373

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff-Appellee/
Cross Appellant,

v.

MARRIOTT CORPORATION, et al.,
Defendants,

MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant-Appellant/
Cross Appellee.

Before: Jones and Norris, Circuit Judges;
Joiner, Senior District Judge

JUDGMENT
(Filed January 29, 1993)

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATIONS WHEREOF, it is ordered that the judgment of the district court is reversed, and judgment is hereby ordered to be entered in favor of defendant Marriott Family Restaurants, Inc.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk
A True Copy.
Attest:
/s/ Teresa Bertke, Deputy Clerk
Issued as Mandate: April 12, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

Nos. 91-3330-3373

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff-Appellee/Cross Appellant,

v.

MARRIOTT CORPORATION, ET AL.,
Defendants,

MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant-Appellant/Cross Appellee.

BEFORE: JONES and NELSON, Circuit Judges; and JOINER,* Senior District Judge.

ORDER
(Filed April 2, 1993)

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

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* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan.

924 F.2d 1057 (Table)
Unpublished Disposition
(Cite as: 924 F.2d 1057)

NOTICE: Sixth Circuit Local Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff-Appellee,

v.

MARRIOTT CORPORATION, et al.,
Defendants,
MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant-Appellant.

No. 91-3020.
United States Court of Appeals, Sixth Circuit.
Feb. 7, 1991.

S.D.Ohio, 87-00337, Spiegel, J.
S.D.Ohio

APPEAL DISMISSED.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

(THE FOLLOWING UNREPORTED DECISION IS REPRODUCED FOR THE CONVENIENCE OF RESEARCHERS. ADD THE NOTATION: (text in WESTLAW) TO ANY CITATION OF THIS DECISION.)

Before RYAN and SUHRHEINRICH, Circuit Judges; and SILER, Chief District Judge.*

ORDER

The defendant appeals the district court's judgment in favor of the plaintiff in this diversity contract dispute. The district court's docket sheet indicates that judgment was entered in the district court on November 16, 1990. On December 3, 1990, the defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. On December 14, 1990, while that motion was still pending, the defendant filed a notice of appeal.

The defendant's motion was made within ten days of the judgment. See Fed.R.Civ.P. 6(a) (intermediate Saturdays, Sundays, and legal holidays are excluded). If a timely motion for judgment under Fed.R.Civ.P. 50(b) or for new trial under Fed.R.Civ.P. 59 is made, the time for appeal shall run from the entry of the order denying a new trial or other time-tolling motion. Fed.R.App.P. 4(a)(4). A notice of appeal filed before the disposition of any of the above motions is of no effect, and a new notice must be filed within the prescribed time. Id.

It is therefore ORDERED that this appeal is dismissed sua sponte for lack of jurisdiction, without prejudice to the defendant's right to perfect a timely appeal in the event its post-judgment motion is denied. Rule 9(b)(1), Local Rules of the Sixth Circuit.

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* The Honorable Eugene E. Siler, Jr., Chief U.S. District Judge for the Eastern District of Kentucky, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-87-0337

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff,

vs.

MARRIOTT CORPORATION, et al.,
Defendants,

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND VACATING THE SCHEDULING ORDER
(Filed September 27, 1989)

This matter came before the Court for a hearing on September 21, 1989 on the defendant's motion for partial summary judgment (doc. 14), the plaintiff's memorandum in opposition (doc. 25), the defendant's reply (doc. 29), and the defendant's supplemental memorandum (doc. 33). The defendant's motion relates to the first and second causes of action in the plaintiff's complaint. The first cause of action states claims for breach of contract and promissory estoppel involving several motel renovation contracts between the plaintiff and defendant. The second cause of action concerns a settlement agreement entered into by the plaintiff and the defendant. It seeks relief for the breach of that agreement in the form of a declaratory judgment rendering it invalid. This Court grants the defendant's motion for partial summary judgment on both the first and second causes of action. However, the plaintiff is granted leave to amend its second cause of action no later than September 28, 1989 so as to seek relief for breach of the settlement agreement in the form of damages available thereunder, which may or may not be limited to the terms of the settlement

agreement. The plaintiff's third cause of action is not treated by the motion for summary judgment. The third cause of action was dismissed at the hearing, however, by consent of both parties.

Furthermore, the Court vacates its previous scheduling order (doc. 31). Discovery will now be held open until December 31, 1989, a final pretrial conference will be held January 29, 1990 at 10:00 a.m., and the trial is scheduled to begin February 12, 1990. The trial is expected to be a five-day jury trial.

FACTS

In early 1983, the plaintiff, Construction Interior Systems, Inc. (CIS), bid for and was awarded three renovation projects by the Howard Johnson Company. One of the projects was located in Springfield, Massachusetts, and the other two were in Richmond, Virginia. Each project was bid for and awarded separately. In early April of 1983, Howard Johnson contacted CIS and instructed them not to proceed on the projects and removed CIS from the bidders' list. CIS was able to cancel its subcontracts without liability and was reimbursed for its out-of-pocket expenses by Howard Johnson (doc. 25, p. 2).

In late 1983, CIS and Howard Johnson entered into a settlement agreement that released Howard Johnson from any and all claims relating to the termination of CIS on the three awarded projects and returned CIS to Howard Johnson's bidders list. The settlement agreement also provided that if, after one year from the date of the agreement, CIS had not been the successful bidder on $300,000 worth of work, Howard Johnson would negotiate with CIS for the performance of work which, together with the amount of work that had been awarded during the year, would equal the sum of $300,000. Howard Johnson and CIS did not negotiate for $300,000 worth of work in 1984. Howard Johnson then agreed to extend the settlement agreement through the 1984-1985 fiscal year. In 1985, the assets of Howard Johnson were acquired by the Marriott Corporation. Marriott retained ownership of the Howard Johnson restaurants but sold the motels to Prime Motor Lodges, Inc.

Howard Johnson never awarded CIS the $300,000 worth of work, and in March of 1986 Howard Johnson notified CIS that it would only accept bids from local contractors. However, CIS did perform over $300,000 worth of work for Prime Motor Lodges, Inc. at the motels formerly owned by the Howard Johnson Company. CIS than filed this lawsuit in May of 1987.

STANDARD FOR SUMMARY JUDGMENT

The narrow question that we must decide on a motion for summary judgment is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing *conclusively* that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith* v. *Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis in original), *cert. denied*, 444 U.S 986 (1979). We are further guided by the Supreme Court's recent elaboration of this standard in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) as follows:

> . . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial . . . .

477 U.S. at 322.

DISCUSSION

The plaintiff's complaint contains three causes of action. The first cause of action contains three counts. The first count is a breach of contract claim in which the plaintiff seeks to

recover anticipated profit and allocated overhead for the breach of the three awarded renovation contracts. The second count is a promissory estoppel claim for anticipated profit and allocated overhead on the same three renovation jobs. The final count sounds in promissory estoppel and seeks to recover damages for the work the plaintiff would have done on future renovation jobs if it had not been removed from the bidders list and had been awarded such jobs. The defendant argues that it is entitled to summary judgment on all three counts of the first cause of action because these counts seek recovery on claims that have been fully discharged by the settlement agreement.

In order to decide whether the settlement agreement discharged the plaintiff's claims under the original renovation contracts, this Court must determine whether the agreement is a substitute contract or an executory accord. If the settlement agreement is a substitute contract then the plaintiff's claims based on the original renovation contracts are fully discharged and the plaintiff is limited to its rights under the settlement agreement. *Markowitz & Co.* v. *Toledo Metropolitan Housing Authority*, 608 F.2d 699, 705 (6th Cir. 1979). If the agreement is an executory accord, however, the agreement merely acts to suspend the plaintiff's rights under the original renovation contracts; upon breach of the settlement agreement the plaintiff has the option to either proceeding on its rights under the agreement or treating the breach as a rescission of the settlement agreement and reverting to its original rights under the renovation contracts. *Id.*

In Ohio, the burden of proving that a settlement agreement is a substitute contract rests on the party attempting to use the existence of the agreement as a defense against an action brought on the basis of the original contract. *Id.* The determination of whether or not an agreement is a substitute contract hinges on the intention of the parties. *National American Corp.* v. *Federal Republic of Nigeria*, 448 F. Supp. 622, 643 (S.D.N.Y.), *aff'd.* 597 F.2d 314 (2d Cir. 1979). If the parties intended the existing claims to be immediately discharged in exchange for the settlement agreement, then the agreement is a substitute contract even though performance under the

agreement is to commence in the future. *Id.* On the other hand, if the parties did not intend the existing claims to be discharged until the occurence of a future event, then the agreement is an executory accord. *Id.*

In the present case, the unequivocal language of the agreement itself indicates that the parties intended the agreement to immediately discharge the existing claims and act as a substitute contract. The terms of the agreement state that "[y]ou [the plaintiff] agree and by executing this letter acknowledge that you release Howard Johnson Company from any and all claims . . . ." The agreement also states that "[w]e [the defendants] agree immediately to put you on the bidders' list for construction and rehab work." In fact, the plaintiff was unable to offer any argument either through its pleadings or in oral argument at the hearing that the settlement agreement was not intended to discharge its previous claims against the defendant under the renovation contracts. Therefore, this Court grants the defendant's motion for summary judgment as to plaintiff's first cause of action because the settlement agreement precludes the plaintiff from asserting its original claims under the renovation contracts.

In its second cause of action the plaintiff seeks a judgment "declaring the earlier settlement agreement between plaintiff and Marriott-Howard Johnson of $300,000 to be void and of no effect." The plaintiff essentially asks this court to set the settlement agreement aside so that it can proceed on its original claims under the renovation contracts. Since this Court has already decided that the settlement agreement constitutes a substitute contract which prevents the plaintiff from proceeding on its original claims, the relief prayed for in the second cause of action is unavailable to the plaintiff. Therefore, this Court grants the defendants' motion for summary judgment as to the plaintiff's second cause of action. However, the Court will grant the plaintiff leave to amend its complaint no later than September 28, 1989 so as to seek relief in the form of damages for the breach of the settlement agreement, which may or may not be limited to the terms of that agreement.

The plaintiff's third and final cause of action is not ad-

dressed by the defendant's motion for summary judgment. However, this Court dismissed the third cause of action at the hearing on September 21, 1989 by consent of both parties.

Finally, this Court vacates its previous scheduling order (doc. 31). Discovery will be held open until December 31, 1989, a final pretrial conference will be held January 29, 1990 at 10:00 a.m., and the trial is scheduled to begin February 12, 1990. The trial is expected to be a five-day jury trial.

SO ORDERED.

/s/ S. Arthur Spiegel
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-87-337

CONSTRUCTION INTERIOR SYSTEMS, INC.,
Plaintiff,

vs.

MARRIOTT FAMILY RESTAURANTS, INC.,
Defendant.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL
(Filed March 14, 1991)

This matter is before the Court on the defendant's proposed findings of fact and conclusions of law on its counterclaim for a declaratory judgment (doc. 105). In the event that the Court found that it was not entitled to findings of fact and conclusions of law by the Court, the defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial (doc. 106), to which the plaintiff has filed a memorandum in opposition (doc. 110), to which the defendant has replied (doc. 111).

The plaintiff's second amended complaint sought relief for the defendant's breach of a settlement agreement. The defendant's counterclaim sought a declaratory judgment that the defendant had fully satisfied the terms of the settlement agreement. The defendant's counterclaim involved exactly the same issues as the plaintiff's second amended complaint. These issues were tried to a jury which returned a general verdict in favor of the plaintiff in the amount of $380,590 on November 16, 1990. Under these circumstances, we find that the defendant is not entitled to findings of fact and conclusions of law

by the Court. Otherwise, a defendant would essentially be able to defeat a plaintiff's right to a jury by asserting its defense to the plaintiff's claim in the form of a counterclaim for a declaratory judgment that the claim of the plaintiff should be resolved in the defendant's favor. We now turn to the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

In order to grant the defendant a judgment notwithstanding the verdict, the evidence must be such that there can be but one reasonable conclusion as to the proper verdict. *McJunkin Corp.* v. *Mechanicals, Inc.*, 888 F.2d 481, 485 (6th Cir. 1989); *Standard Alliance Industries* v. *Black Clawson Co.*, 587 F.2d 813, 123 (6th Cir. 1978). The Court must weigh the evidence in the light most favorable to the non-moving party. *McJunkin*, 888 F.2d at 485. The Court may not grant a judgment notwithstanding the verdict unless reasonable minds could not differ as to the counclusions to be drawn from the evidence. *McJunkin*, 888 F.2d at 486; *Hildebrand* v. *Board of Trustees of Michigan State University*, 662 F.2d 439, 443 (6th Cir. 1981). Similarly, the Court may exercise its discretion to order a new trial only upon finding that the jury verdict is against the clear weight of the evidence presented at trial. *Bruner* v. *Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). If it is clear that there could be only one reasonable conclusion from the evidence and that conclusion is contrary to the one returned by the jury, then the Court may set aside the jury verdict. *Id.* However, the Court may not set aside the jury verdict "merely because the jury could have drawn different inferences or conclusions" or because the Court believes that another conclusion would have been more reasonable. *Id.*

In early 1984, the plaintiff, Construction Interior Systems, Inc. (CIS), entered into a written settlement agreement with the Howard Johnson Company (Howard Johnson). The settlement agreement stated, in part, as follows:

> We [Howard Johnson] agree immediately to put you [CIS] on the bidders' list for construction and rehab work. If after one year from this date you have not

> been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000.

In late 1985, the stock of Howard Johnson was purchased by the Marriott Corporation. On November 22, 1985, Howard Johnson sold its motor lodges and the right to use the Howard Johnson name to Howard Johnson Company, Inc. (HJCI). Howard Johnson then changed its name to Marriott Family Restaurants, Inc. (MFR) which is the defendant in this case.

During the trial, the defendant conceded that the settlement agreement obligated it to return the plaintiff's name to the bidders' list, but the defendant argued that this obligation did not require it to send the plaintiff an invitation to bid on any specific number of projects. The defendant also contended that its obligations under the settlement agreement would be fully satisfied if the plaintiff was awarded $300,000 worth of refurbishment work on Howard Johnson motor lodges. The plaintiff contended that the defendant's obligation to return the plaintiff to the bidders' list had a value in excess of the defendant's obligation to provide the plaintiff with a minimum of $300,000 worth of work during the first year of the agreement. The plaintiff argued that the defendant was obligated to send the plaintiff invitations to bid on all Howard Johnson motor lodge work from the date of the agreement forward so long as the plaintiff continued to perform the work according to bid plans and specifications. The plaintiff claimed that the value of the defendant's obligation to return the plaintiff to the bidders' list was well in excess of $300,000 and produced evidence as to its history of successfully bidding on Howard Johnson motor lodge work to establish the value of being returned to the bidders list.

The Court found that the written settlement agreement was ambiguous and allowed the jury to consider the circumstances surrounding the execution of the agreement in order to inter-

pret the agreement's written terms. Although the Court found that the agreement did not contain an express time limitation, the Court refused to allow the jury to award damages for lost profits after 1986 because they were too remote and speculative. The Court only allowed the plaintiff to introduce evidence as to the amount of profit it would have earned from the date of the agreement until the end of 1986 had it been permitted to bid on all of the Howard Johnson motor lodge refurbishment projects during this time period.

The defendant supports its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial by reference to its proposed findings of fact and conclusions of law. In the defendant's proposed findings of fact and conclusions of law, the defendant asserts that its obligations under the settlement agreement were assigned to and assumed by HJCI. The Court instructed the jury that the defendant's obligations under the settlement agreement were assigned to and assumed by HJCI as a matter of law.

The defendant contends that the jury's verdict was against the weight of the evidence because it included damages for profits lost by the plaintiff during the 1984 construction cycle. The defendant argues that the plaintiff's damages should have been limited to lost profits for the 1985 construction cycle, the performance of which was delayed until 1986, because the plaintiff agreed to extend the one-year settlement agreement into 1985 and thereby released the defendant from any claim for a breach of the settlement agreement in 1984. The defendant claims that the plaintiff did not pursue its right to negotiate for $300,000 worth of work during 1984 in exchange for an extension of the settlement agreement through 1985.

The plaintiff argues that the settlement agreement was not limited to a term of one year, and therefore, there was no reason for the plaintiff to agree to release the defendant from its claim for breach of the agreement in 1984. The plaintiff asserts that it did not pursue its right to negotiate for $300,000 worth of work during 1984 because it wished to maintain good relations with the defendant and focus on successfully bidding on future projects.

Considering the evidence in the light most favorable to the plaintiff, we find that the jury's award of damages for profits lost by the plaintiff during both the 1984 and 1985 construction cycles is not against the weight of the evidence. The jury could have reasonably concluded that the settlement agreement was not limited to a term of one year, and therefore, the jury could have concluded that the plaintiff did not release the defendant from its claim for breach of the agreement in 1984 in exchange for an extension of the agreement.

The defendant also argues that the jury's verdict was against the weight of the evidence because the terms of the settlement agreement were fully satisfied when the plaintiff obtained $495,000 worth of work from HJCI in 1986. The defendant asserts that this amount of work fully satisfied its obligations under the settlement agreement because the defendant was only obligated to provide the plaintiff with $300,000 worth of work under the terms of that agreement. The Court instructed the jury that the $495,000 worth of work that the plaintiff obtained from HJCI was performed in satisfaction of the settlement agreement pursuant to the defendant's assignment of its obligations under the agreement to HJCI. However, we allowed the jury to consider whether this work fully or only partially satisfied the defendant's obligations under the settlement agreement. The jury apparently accepted the plaintiff's view that the defendant's obligation to return the plaintiff to the bidders' list under the settlement agreement had a value independent of and in excess of the defendant's obligation to provide the plaintiff with at least $300,000 worth of work. Considering the evidence in the light most favorable to the plaintiff, we find that the jury's conclusion is a reasonable one.

Accordingly, the defendant's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial is hereby denied.

SO ORDERED.

Dated: 3/13/91 /s/ S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

No. C-1-87-337

CONSTRUCTION INTERIOR SYSTEMS, INC.
v.
MARRIOTT FAMILY RESTAURANTS, INC.

VERDICT
(Filed November 16, 1990)

WE, THE JURY, IN THE ABOVE ENTITLED AND NUMBERED CASE FIND:

In favor of the plaintiff, Construction Interior Systems, Inc., and assess damages against the defendant, Marriott Family Restaurants, Inc., in the amount of $380,590.

Foreperson's signature
/s/ Carolyn Sue Knox

Dated 11-16-90

1. _____ 2. _____

3. _____ 4. _____

5. _____ 6. _____

7. _____
Forepetson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

No. C-1-87-337

CONSTRUCTION INTERIOR SYSTEMS, INC.

v.

MARRIOTT FAMILY RESTAURANTS, INC.

JUDGMENT IN A CIVIL CASE
(Filed November 16, 1990)

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action came on for trial before the Court and a Jury, the Honorable S. Arthur Spiegel, District Judge, presiding, and the issues having been duly tried and the Jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Construction Interior Systems, Inc., recover of the defendant, Marriott Family Restaurants, Inc., damages in the amount of THREE HUNDRED & EIGHTY THOUSAND, FIVE HUNDRED & NINETY ($380,590.00) DOLLARS, with interest thereon at the rate of 7.51%, and its costs of action.

Date
November 16, 1990

KENNETH J. MURPHY
Clerk
/s/ Paul Schulz
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NOS. 91-3330 and 91-3373
CIVIL ACTION NO. C-1-87-0337

Cincinnati, Ohio
Monday, November 5, 1990
First Day of Jury Trial
Volume I (Pgs. 1-99)

CONSTRUCTION INTERIOR SYSTEMS,
Plaintiff

-vs-

MARRIOTT CORPORATION,
Defendant.

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY

TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

APPEARANCES:

For the Plaintiff:	STRAUSS & TROY By: Charles G. Atkins, Esq. and Larry A. Temin, Esq. 2100 Central Trust Center Cincinnati, Ohio 45202
For the Defendant:	SCHOTTENSTEIN, ZOX & DUNN By: John P. Gilligan, Esq. and Edwin L. Skeens, Esq. The Huntington Center 41 South High Street Columbus, Ohio 43215
Law Clerk:	Adam P. Hall, Esq.
Courtroom Clerk:	Paul J. Schulz, III
Court Reporter:	Mary Ann Ranz

* * *

[41] BY MR. ATKINS:

Q. What is your address, Mr. Penker?

A. 776 Watch Point Drive, Anderson Township, Cincinnati.

Q. And, Mr. Penker, what is your present occupation?

A. I'm president of Construction Interior Systems.

Q. How long have you served in that capacity?

A. Since the inception of the company in 1978, early '80, when it was incorporated.

Q. Mr. Penker, what is your educational background?

A. I have a Bachelor's degree from Xavier University in Cincinnati, 1961; went to night school and got my Master's degree in 1963, master degree in business.

Q. Can you briefly tell the jury what your work history is after you got out of college?

A. After getting out of college I went to work for the family construction company, Penker Construction. I worked at Penker Construction in various capacities: project management, cost accounting, estimating, bidding, till 1970. For a short period of time I went into business for myself, but due to lack of funds I then took up a job with Winegardner & Hammons, who is a large hotel/motel developer, franchiser, and I was vice-president of construction for them over forty-two Holiday Inns across the United States. That lasted until 1979 when I left and formed CIS with my partner, Mr. Cady. And due to the fact it was a very young company, I was then asked to become a [42] consultant on a $28 million renovation on the Netherland Plaza Hotel here in Cincinnati and I served as a consultant on that project till late '83. And then the owners of the Carew Tower asked me to stay on with them doing capital improvements to the Carew Tower and also property management on the Carew Tower, which I did up till the time it was sold in January this year.

Q. So you actually then held a position as a manager of the Carew Tower simultaneously with your position as president of CIS?

A. That is correct.

Q. And you devoted most of your daytime work then to the Carew Tower job; is that it, sir?

A. Most of the time, although they were very lenient in allowing me time to deal with matters at CIS as well.

Q. During this period of time, sir, when you were working for your family construction company, can you describe the kinds of jobs, just briefly, that Penker Construction Company was engaged in?

A. We did high-rise residential projects. Beachwood Housing is one example here in Cincinnati. Cincinnati Music School, we constructed that; Third Street Distributor in the bridge area, Corps of Engineers' dams, Holiday Inn Downtown, Hammond North apartments. We were both in the commercial, residential and heavy construction.

Q. You had experience in all those areas in terms of bid [43] estimating and job superintendents prior to forming CIS?

A. Yes, but primarily more in the residential and commercial area than in the heavy and highway, although I did do some of that as well.

Q. All right, sir. Then with Winegardner Hammons did you also supervise the construction of Holiday Inns?

A. That's correct.

Q. When you formed CIS, Mr. Penker, what was the purpose of this company in terms of how it was going to operate and the market it was going to seek out for potential customers?

A. The whole company, the premise of building the company was — while I was with Winegardner & Hammons — one of the biggest things the hotel industry lacked were companies who could come in and renovate rooms and hallways and some commercial work on a production-type of basis. One of the common problems that I experienced at Winegardner Hammons, as well as problems that I would hear from other companies operating motels, was that they would wind up dealing with very small companies and it would take them weeks to do a very few number of rooms which meant the property was losing a lot of revenue. And so we took the approach there was a way to do this work on a high production basis, anywhere from four to ten rooms a day complete, turned back to the owner for rental, and that was

the main basis of specializing in the rooms and hallways even though we did other work aside from that, such as exterior painting, lobby [44] renovations, meeting room renovations. By and far, probably 90 percent of our work was in doing rooms and hallways on a production basis.

Q. When CIS first started out and became operational then in 1980 and up through, say, the period of 1983 when these contracts were terminated — we'll talk about that in a little bit — did CIS also have the opportunity to do additional outside work other than exterior painting such as roof repairs and that sort of thing?

A. We did some roof repairs on the Howard Johnson Company's Columbus West for Mr. Dameron. We also were involved in doing some estimating and some analyses for Howard Johnson on some — I don't know what you would call them — they were rental lodges behind the Columbus East motel that Howard Johnson also owned.

Q. As part of the CIS operation then, you have not mentioned doing structural work. Was that something that CIS did not itself do?

A. We did not try and go after that in any ongoing approach because when you're setting up a production line basis, everybody realizes you have to do things in a very short time span in a very coordinated way, and when you get into structural work, this is a much more elongated time. And the way you make money in the room and hallway renovations is, the faster you do them, the more money you have the potential of [45] making, and structural work does not lend itself to that production-type of situation.

Q. Just so we're clear, Mr. Penker, for the jury, could you describe what we're talking about when we say "structural work" as opposed to the rooms, corridors, exterior painting, roof repair and so forth? What is structural work?

A. Well, structural work would be repairing columns, floor slabs. In the case of motels, many have exterior balconies where the concrete has cracked, chipped away or any kind of a failure of the main building itself or in the constructing of a new frame for a new building.

Q. Would it also include then such things as relocation of bearing walls within the structure and that sort of thing? Is that structural work?

A. Oh, that is very definitely structural work.

Q. This is not an area that CIS did, structural aspect; is it, sir?

A. No, we could do it but, like I said, this is not production-type of work and our supervision, our crews and everything were geared that when we moved into a property, we looked to perform at least four rooms a day. Four to five days was typical for Howard Johnson, for example, because of their type of scope of work. And we did rooms in Miami, Florida, for example, where we did ten rooms a day on a 500-room order project. So it varies on the scope of the work the owner wants [46] done.

Q. Mr. Penker, up to this time in 1981 and April of '83 when Mr. Dameron took CIS off the bid list, prior to that time can you tell the jury the clientele that your company had for refurbishing/renovation work?

A. We did almost exclusively work for Howard Johnson during that period of time. We had very few contracts. I guess in terms of percentage, we probably did 90- to 95 percent of our work for Howard Johnson.

Q. Has your company done work for Ramada Inn?

A. Yes, we have.

Q. And for Holiday Inn?

A. Yes, we have.

Q. Best Western?

A. Yes, we have.

Q. Budgetel?

A. Yes.

Q. Imperial 400?

A. Yes.

Q. Marriott Inn?

A. Yes, I want to qualify that. I'm not sure. We had done Marriott properties but not owned by Marriott's parent company.

Q. Mr. Penker, I believe you just said that in these years '81 to '83 that you were saying that 90- to 95 percent of CIS's work was done, however, for Howard Johnson; is that correct,

* * *

[69] fruition.

Q. Was there any discussion about the number of rooms that were going to be renovated in the 1984 and 1985 construction years for Howard Johnson Motor Lodge Division?

A. Mr. Wickham, who was in charge of the ADC Department of Howard Johnson — which was Architect, Design and Construction Department for Howard Johnsons — basically made this offer to us in that, No. 1, "We would" — "We will put you back immediately on the bidders' list to bid the Howard Johnson work for 1984, 1985 and thereafter," unless there was a reason to remove us from that list later on. At the same time he made that proposal to us, he said, "You must understand, as a part of this proposal we have a renovation program set up for 1984 that contains 2500 rooms of renovation to be done," and that by being on the bidders' list, we would have an opportunity to bid that work.

MR GILLIGAN: Your Honor, excuse me.

THE COURT: Are you objecting?

MR. GILLIGAN: Object; move to strike. That that contradicts the terms of the —

THE COURT: I'm going to give you a chance to cross-examine on that, but I'm going to permit it to remain because it explains the contract. Go ahead.

Q. Had there ever been any opportunity before for CIS when it was on the bidders' list to participate in such a comprehensive [70] motor lodge program for Howard Johnson?

A. Nothing of this size.

Q. Did you consider this then to be a substantial advantage, particular advantage, to be placed on the bidders' list because of the number of rooms that were scheduled for the 1984 and '85 renovation period?

A. Absolutely. It far exceeded any potential damages we may have had from the prior problems. It was an incentive for us to participate, in essence.

Q. Were there any statements made by Mr. Wickham, Mr. Stearns or anyone else from Howard Johnson about the 1985 room renovation program and the number of rooms that were — would be renovated?

A. They simply made the statement there was a similar amount of work that was also going to be available in 1985 and that we would also have the opportunity to bid future years as well, provided something didn't happen that would result in us having to be removed also for that bidders' list.

Q. Were there discussions also about, at that meeting, about what would happen if in this 2500 rooms that were going to be — you were gonna have an opportunity to bid on in 1984 that you didn't receive a certain amount of work from those — from those bids?

A. Yes.

THE COURT: I think you're sort of leading the

* * *

[76] THE COURT: I'm having a little trouble following what you're doing. Why can't he explain what the terms of the contract were that he entered into?

MR. ATKINS: I'll withdraw the question.

THE COURT: All right.

CONCLUSION OF SIDEBAR CONFERENCE

THE COURT: You want to ask another question?

Q. Mr. Penker, are you ready? New question: What did you understand the agreement to mean when it said that you were placed back on the bidders' list for construction and rehab work insofar as CIS's ability to bid on the new construction work for 1984?

MR. GILLIGAN: Objection, Your Honor. Same basis.

THE COURT: Why don't you just ask the question,

"What do you understand about being on the bidders' list for construction and renovation?"

A. We would have the opportunity to bid on all the work through the Howard Johnson Company by virtue of being on that list because that is the way it was when we were terminated.

Q. Did anybody make any contrary suggestion to that way of bidding?

A. No.

Q. Did Mr. Sterns tell you it was changed in any way?

A. No.

Q. Or anybody else tell you that?

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NOS. 91-3330 and 91-3373
CIVIL ACTION NO. C-1-87-0337

Cincinnati, Ohio
Tuesday, November 6, 1990
Second Day of Jury Trial
Volume 2 (Pgs. 100-302)

CONSTRUCTION INTERIOR SYSTEMS,
Plaintiff,
-vs-
MARRIOTT CORPORATION,
Defendant.

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY

TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

APPEARANCES:

For the Plaintiff:	STRAUSS & TROY By: Charles G. Atkins, Esq. and Larry A. Temin, Esq. 2100 Central Trust Center Cincinnati, Ohio 45202
For the Defendant:	SCHOTTENSTEIN, ZOX & DUNN By: John P. Gilligan, Esq. and Edwin L. Skeens, Esq. The Huntington Center 41 South High Street Columbus, Ohio 43215
Law Clerk:	Adam P. Hall, Esq.
Courtroom Clerk:	Paul J. Schulz, III Elizabeth Schaeffer
Court Reporter:	Mary Ann Ranz

* * *

[274] available to testify, the parties may take the testimony of that witness, as though the party were present on direct examination and cross-examination, before a notary public, and then the testimony is read in the courtroom to the jury. Sometimes it's taken on videotape so that you can also see the witness testifying, or other times it is just taken by the court reporter and there's a typewritten transcript which is read to you in the courtroom. And you're supposed to give the same weight to the testimony as if the witness were present.

In the preparation of trial, there is also another type of deposition taken called a "Discovery deposition," where a party can take the testimony of opposing witnesses or opposing parties as if on cross-examination and that asks questions of the witness, and the witness must respond under oath unless there are questions that are objectionable. At that point they would be ruled upon or at some point would be ruled upon. And I don't know — this probably is a discovery deposition taken on behalf of the defendants by Mr. Gilligan of Mr. Penker. And during the course of taking the deposition, as they refer to documents, they'll identify a document and give it an exhibit number, and probably this exhibit, which is Exhibit 11 in this case, was given "Exhibit No. 4" at the time they were taking Mr. Penker's deposition. Okay. Go ahead.

Q. And, Mr. Penker, on Defendant's Exhibit X, there is no explicit language that says that Construction Interior Systems [275] is entitled to bid any particular number of jobs; is there, sir?

A. In terms of standard construction practice, when you are placed on a bidders' list, you are issued invitations for all bids issued by that person who creates the list. That is standard construction practice.

Q. There is no such language in Defendant's Exhibit X; is there, sir?

A. Yes, there is, the first sentence: "We agree immediately to put you on the bidders' list for construction and rehab work." Under standard construction practice, that means you

have the opportunity to bid the work that is available from that company. That is the purpose of the list.

Q. The key feature of this settlement agreement, according to you, was the ability to bid on 2500 rooms?

A. Being placed on the bidders' list, No. 1, and being able to bid 2500 rooms, No. 2; that is correct.

Q. And that key feature of 2500 rooms isn't in this settlement agreement; is it?

A. In terms of quantity, no, it is not. It was verbally stated by Mr. Wickham.

Q. And let me ask you: it was stated to you by Mr. Wickham or Mr. Stearns?

A. Mr. Wickham. Mr. Wickham actually represented or ran the meeting for Howard Johnsons. I basically responded for [276] Construction Interior Systems.

Q. And the other parties in the meeting were present at this time?

A. They were.

Q. And the proposal you've talked about in the settlement discussions which again — let me rephrase that.

The 5000 room figure, that was told to you by Mr. Stearns; is that right?

A. Mr. Wickham. In the process of discussing the agreement or the offer — really at that point it was an offer on the part of Howard Johnson — Mr. Wickham, in order to make that offer, had to tell us just what the bid invitations would be. You have to look at it in terms of the fact that just being put on the bid list doesn't mean anything unless you know how many projects, approximate size of projects, you're going to have an opportunity to bid.

If you look at it one way, you could say, "Fine, you're on the bid list but there is only going to be one project in the next five years." That means nothing in terms of an incentive to do anything because you may or may not get that job, No. 1, and certainly that is not an offer in comparison with the losses that we had claimed in '83.

So they were making an offer to us to offset the damages that we had suffered in '83 and, therefore, the offer had to be

substantial, and that's when he said, "We have a [277] planned program for 1984 and a similar amount of work in 1985 amounting to 2500 rooms." That was reconfirmed by Mr. Dameron in my conversation with Mr. Dameron in, I think it was, March of '84, he restated the figure.

Q. Mr. Penker, let me ask you to turn to Defendant's Exhibit Y. It's already been admitted as Plaintiff's Exhibit 12.

A. Okay.

Q. This is your response to Mr. Stearns?

A. That's correct.

THE COURT: You may look at that Plaintiff's Exhibit 12.

A. That's correct.

Q. And you and Mr. Cady thought about this response for some time before you sent this letter back to Mr. Stearns?

A. Yes.

Q. And again, nowhere in Defendant's Exhibit Y do you make any mention of any specific number of rooms?

A. No, I did not. We believed what we were told.

Q. Didn't you tell Mr. Stearns that you wanted to prove that Construction Interior Systems' work was acceptable?

A. I'm sorry; say that again.

Q. Didn't you tell Mr. Stearns that you wanted — or did you tell Mr. Stearns that you wanted to prove that the Construction Interior Systems' work was acceptable?

A. You're taking that out of context. Our work was already * * *

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NOS. 91-3330 and 91-3373
CIVIL ACTION NO. C-1-87-0337

Cincinnati, Ohio
Wednesday, November 7, 1990
Third Day of Jury Trial
Volume III (Pgs. 303-488)

CONSTRUCTION INTERIOR SYSTEMS,
Plaintiff

-vs-

MARRIOTT CORPORATION,
Defendant.

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY

TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

APPEARANCES:

For the Plaintiff: STRAUSS & TROY
By: Charles G. Atkins, Esq.
and Larry A. Temin, Esq.
2100 Central Trust Center
Cincinnati, Ohio 45202

For the Defendant: SCHOTTENSTEIN, ZOX & DUNN
By: John P. Gilligan, Esq.
and Edwin L. Skeens, Esq.
The Huntington Center
41 South High Street
Columbus, Ohio 43215

Law Clerk: Adam P. Hall, Esq.

Courtroom Clerk: Paul J. Schulz, III
Elizabeth Schaeffer

Court Reporter: Mary Ann Ranz

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NOS. 91-3330 and 91-3373
CIVIL ACTION NO. C-1-87-0337

Cincinnati, Ohio
Thursday, November 8, 1990
Fourth Day of Jury Trial
Volume IV (Pgs. 489-607)

CONSTRUCTION INTERIOR SYSTEMS,
Plaintiff

-vs-

MARRIOTT CORPORATION,
Defendant.

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY

TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

APPEARANCES:

For the Plaintiff:	STRAUSS & TROY By: Charles G. Atkins, Esq. and Larry A. Temin, Esq. 2100 Central Trust Center Cincinnati, Ohio 45202
For the Defendant:	SCHOTTENSTEIN, ZOX & DUNN By: John P. Gilligan, Esq. and Edwin L. Skeens, Esq. The Huntington Center 41 South High Street Columbus, Ohio 43215
Law Clerk:	Adam P. Hall, Esq.
Courtroom Clerk:	Paul J. Schulz, III Elizabeth Schaeffer
Court Reporter:	Mary Ann Ranz

* * *

[564] Q. Not true?

A. Not true.

Q. Maybe I misunderstood you. Would you turn to page 73 of your deposition?

A. Okay.

Q. I'm sorry; turn to page 72, first of all.

A. Okay.

Q. Now, sir, in your deposition we had marked what is now the settlement agreement as Exhibit 4 to that agreement. This has been marked here as Plaintiff's Exhibit 11, but just so we're clear, we're talking about the same thing. You don't have a copy of the exhibits — do you have a copy of the exhibits on the back of that deposition?

A. Yes, I do.

Q. Take a look at Exhibit 4, would you, please, sir?

A. Okay.

Q. Is that the same thing that we're talking about here as Plaintiff's Exhibit 11 for trial —

A. Yes.

Q. — the January 24th, 1984 settlement agreement?

A. Yes, it is.

Q. Okay. So when I refer in your deposition to "Exhibit 4," we're still talking about the settlement agreement; correct?

A. Correct.

Q. All right, sir. Sir, on page 72 at line 17, I asked you [565] the following question:

"As I understand it, that was" —

I'm sorry; line 21:

Question: "This agreement, Exhibit 4, contemplates, does it not, that there will be work in 1984 which CIS may bid upon?"

And your response was:

"That would be the intention, sure, that they bid on work effective January, '84, whatever work came along, they would be invited to bid if they — if they qualified for."

Question: "And thereafter?"

Answer: "And thereafter."
Was that a correcxt statement when you made it, sir?

A. The January date is incorrect because John Penker didn't sign the agreement until February 1st. I subsequently received it. Depending whether I was in or out of town, I received it shortly thereafter, I'm certain. So February would have been the correct date rather than January as I said here.

Q. So it would have been then at the latest, let's say, February 1st?

A. No, that would have been the earliest.

Q. Pardon me?

A. That would have been the earliest. He didn't sign it until February 1st. He mailed it and I got it.

* * *

[585] Q. Now, sir, I notice that on Plaintiff's Exhibit 40 that there are a number of bid dates in March — one, two, three, four, five, six, seven, seven bid dates in March. Do you see that, sir?

A. Two, four, six, seven, yes, I see those jobs.

Q. And then there are four more in April. You see that, sir?

A. I do.

Q. Were you aware that these weren't given — that CIS did not receive invitations to bid on these jobs?

A. I don't know whether they were — were or not; I don't know when the invitations to bid went out.

Q. Oh.

A. I don't know whether it was they went out prior to February '84 or subsequent to February of '84. I don't know.

Q. Sir, was it your intention when you signed this — the letter agreement to — the settlement agreement — to make Mr. Penker believe that there was, in fact, motel refurbishing work for 1984 which CIS could bid on?

A. Our discussion was concerning the budget, how many rooms we were going to do in '84 and '85. And the intention of the discussion was to say there was work to be done — you

would be eligible to bid, and they, in fact, did bid, to the best of my knowledge, in 1984.

Q. You don't know how many rooms; do you?

A. I don't know — without knowing what job they bid on, I * * *

* * *

[590] Q. As of January the 24th, 1984 when you sent the settlement agreement to Mr. Penker for signature, did you know how many rooms were then available for refurbishing for the Penker (sic) Construction Company to bid on for work in 1984?

A. No, sir, I did not.

Q. When you received this letter, a copy of this letter on May 10th, or thereabouts, 1984, did you know how many rooms were available for refurbishing in 1984 that the Penker Construction Company could bid on?

A. As of May 10th?

Q. I'm sorry; CIS could bid on.

A. As of May 10th?

Q. Yeah.

A. I did not know a specific number of rooms, no.

THE COURT: May I ask a question?

MR. ATKINS: (Nods head affirmatively.)

THE COURT: Who used the word "2500 rooms" to begin with? Was that in your budget somewhere?

THE WITNESS: That was our capital spending plan for that year.

THE COURT: That was Howard Johnson's number?

THE WITNESS: That was Howard Johnson's number as referred — relayed to the capital budget, yeah, and that was the same number for basically five years, meaning we took the total rooms, divided it, and the answer came out approximately [591] 2500 rooms.

Q. I'd like to look at Exhibit 40 which has been admitted into evidence just another time, sir, and I believe we'll be

able to conclude this in just a minute or two. Have you got that before you?

A. Exhibit 40?

Q. Yes.

A. Yes, I do.

Q. Would you look over in the second column? You see K-1, C-1 and so forth?

A. I do.

Q. Those are to signify either Kronberg or Callahan — you understand what I'm saying?

A. Sure.

Q. Sir, of all the projects that were done in 1984 which the defendants produced documentation for, we have Callahan and Kronberg. Did anybody else get any work in 1984 other than Callahan and Kronberg?

A. I don't know for certain. My guess, there certainly would have been others. I don't know where this list was derived from, whether it's all inclusive or not, but I'm certain there was work done by others than Callahan and Kronberg, but I'm not positive of that. Without seeing something, a status report or something, I can't tell you. I don't think a status report would tell me who did the work. I mean the records. I can't * * *

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

COURT OF APPEALS NOS. 91-3330 and 91-3373
CIVIL ACTION NO. C-1-87-0337

Cincinnati, Ohio
Tuesday, November 13, 1990
Fifth Day of Jury Trial
Volume V (Pgs. 608-793)

CONSTRUCTION INTERIOR SYSTEMS,
Plaintiff

-vs-

MARRIOTT CORPORATION,
Defendant.

COMPLETE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE S. ARTHUR SPIEGEL and JURY

TRANSCRIPT ORDERED BY: Messrs. Klatt and Temin

APPEARANCES:

For the Plaintiff:	STRAUSS & TROY By: Charles G. Atkins, Esq. and Larry A. Temin, Esq. 2100 Central Trust Center Cincinnati, Ohio 45202
For the Defendant:	SCHOTTENSTEIN, ZOX & DUNN By: John P. Gilligan, Esq. and Edwin L. Skeens, Esq. The Huntington Center 41 South High Street Columbus, Ohio 43215
Law Clerk:	Adam P. Hall, Esq.
Courtroom Clerk:	Paul J. Schulz, III Elizabeth Schaeffer
Court Reporter:	Mary Ann Ranz

* * *

[619] theory that —

THE COURT: You have got an open-ended contract and it provides for a minimum. You don't see it provides for a maximum.

MR. GILLIGAN: No. But I say that that's the only obligation that Howard Johnson had under that contract, was to provide them with $300,000 worth of work.

THE COURT: But they had a right to bid for everything; didn't they?

MR. GILLIGAN: No. Where does it say that in the agreement?

THE COURT: Where does it say they don't? That they are to be put on the bidders' list? What's the purpose of being put on the bidders' list? That must mean something.

MR. GILLIGAN: They are a qualified bidder. They are entitled to bid if they are selected. And if they bid and if Howard Johnson likes their bid, Howard Johnson can take it or not take it. But there is no requirement that Howard Johnson, because they put something out to bid and because they are the low bidder, that they are legally bound to accept that bid. I mean, where is the authority or testimony for that?

THE COURT: I think the determination of what the — to be put on the bidders' list, what that means, is a question for the jury as developed by the custom in the industry. My understanding is, when you're put on the bidders' list, [620] ordinarily if you are lower and best, being financially responsible, that your bid's accepted; that being put on the bidders' list, if not, is an illusory contract. That wasn't the intent of the company.

MR. GILLIGAN: Not an illusory contract.

THE COURT: If you're put on the bidders' list, then Howard Johnson doesn't have the obligaton to award them the bid if they are lowest and best.

MR. GILLIGAN: Except the $300,000.

THE COURT: They were entitled to get $300,000 or $15,000 cash. That was the floor. But there was no ceiling, and that's what troubles me about this. And now you say that

being on the bidders' list doesn't mean anything. The contract just merely means they're to get $300,000 bid or negotiate —

MR. GILLIGAN: That right.

THE COURT: — in a year's time. And if they get removed for some reason, they get $15,000 regardless of the cost.

MR. GILLIGAN: That's right.

THE COURT: And that's your interpretation of the contract.

MR. GILLIGAN: That's right. That is what Mr. Stearns testified.

THE COURT: That is his interpretation.

MR. GILLIGAN: He wrote the agreement.

* * *

[LETTER OF JANUARY 24, 1984 FROM JOHN P. STEARNS, VICE PRESIDENT OF HOWARD JOHNSON TO JOHN P. PENKER, PRESIDENT OF CONSTRUCTION INTERIOR SYSTEMS, INC.]

January 24, 1984

Construction Interior Systems, Inc.
P. O. Box J
Cincinnati, Ohio 45230

Attention: Mr John P. Penker, President

Dear John:

This letter will confirm our recent meeting of December 20, 1983, together with our subsequent conversations.

You agree and by executing this letter acknowledge that you release Howard Johnson Company from any and all claims resulting from work which you performed at the Howard Johnson's Motor Lodge in Buffalo (Transit), New York, and work which you claim you were entitled to perform at the Howard Johnson's Motor Lodges in West Springfield, Massachusetts; Richmond (North), Virginia; and Richmond (Midtown), Virginia.

We agree immediately to put you on the bidders' list for construction and rehab work. If after one year from this date you have not been the successful bidder on $300,000 worth of work, we agree to negotiate with you in good faith, subject to prevailing rates and quotes, for the performance by you of work which, together with the amount of work you may have been awarded during the prior year, would equal the sum of $300,000. If, having been awarded a contract or contracts for such work, you fail to perform properly and/or in accordance with the terms and conditions of the contract(s) for same, we shall have the right (a) to terminate such contract(s), (b) not to permit you to bid any further work, and (c) be under no obligation to negotiate any future work with you (in the manner previously mentioned). We shall, however, be obligated

to pay you the sum of $15,000. We shall also, however, be entitled to pursue our legal rights against you for the damages which we may suffer and/or sustain should you breach a contract with us.

Kindly indicate your acceptance of the terms and conditions set forth herein by executing in the space provided below and returning one such fully executed copy to my attention.

Very truly yours,

/s/ JOHN P. STEARNS
Vice President
Auditing & Security

January 1984
Agreed to:
C.I.S. CONTRACTING COMPANY

By: /s/ JOHN P. PENKER
See qualification in my letter

[LETTER OF FEBRUARY 1, 1984 FROM JOHN P. PENKER, PRESIDENT OF CONSTRUCTION INTERIOR SYSTEMS, INC. TO JOHN STEARNS, VICE PRESIDENT OF HOWARD JOHNSON]

February 1, 1984

Mr. John Stearns
Howard Johnson's
250 Granite Street
Braintree, Massachusetts 02184

Dear John:

I am returning herewith your letter dated January 24th, 1984 signed by me on behalf of Construction Interior Systems, Inc., signifying our acceptance of your letter and our mutual understanding contained therein except for one qualification which I feel is necessary since your company has changed procedures and personnel since our last contract work.

The qualification which I wish to make is that we have the opportunity to review and negotiate, if necessary, the terms and conditions of your current contract to help insure that we (Howard Johnson's and CIS) have a full understanding as to the terms and conditions under which we are bidding the work at this time.

I do not anticipate this being a major problem if you are currently using a standard AIA Contract and General Conditions or we can insert into future contracts and addendum covering certain non-standard conditions as we have been permitted to do in the past.

If you agree that this should not be a problem, I feel we could proceed immediately to investigate current projects for bidding purposes while any review and negotiations concerning contract clauses is in process.

I am sure you can understand my concern in view of us agreeing to release the Howard Johnson's Company from any

past work related claims which we may have since non-conformance to contract terms and conditions is the basis for any future termination.

I am sorry I did not think of this previously; please let me know how you wish to proceed based on my qualification.

Sincerely,

Construction Interior Systems, Inc.

John P. Penker
President

cc: File
cc: Desk

Chrono

JPP:jjc

[LETTER OF MAY 14, 1984 FROM ROBERT J. WICKHAM, GROUP VICE PRESIDENT, HOWARD JOHNSON TO JOHN P. PENKER, PRESIDENT OF CONSTRUCTION INTERIOR SYSTEMS, INC.]

May 14, 1984

Mr. John Penker
President
Construction Interior Systems, Inc.
431 Ohio Pike
Suite 212
Cincinnati, OH 45230

Dear Mr. Penker:

It is regrettable that the Motor Lodge Program for 1984 has advanced to the contractual stage which places your intended participation with us into the next fiscal year. I am pleased to extend our agreement as requested in your letter of 5/10, and we will make every effort to abide by the intent of our agreement.

One of the unfortunate problems with your being able to participate in the 1984 schedule was evidently a matter of workload placed upon your company by other commitments. Had that not been the case, I am sure we would have welcomed your participation in the bidding of the project in Florida which Mr. Dameron spoke to you about some time ago.

Perhaps if your were to make us familiar with your availability for project assignments through the coming fiscal year, we can make suitable arrangements for you to place a bid on that work which will be available.

Very truly yours,

/s/ ROBERT J. WICKHAM
Group Vice President,
Facilities

RJW*mab